TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 423

PAUL F. BRUNING, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 30, 1963
CERTIORARI GRANTED NOVEMBER 18, 1963

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. .....

PAUL F. BRUNING, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT

And Now comes Paul F. Bruning, by his attorney, James G. Marks, Jr., and brings this action against the United States of America upon a cause of action whereof the following is a statement:

1. The Jurisdiction of this Court is furnished by Section 1346 (a) (1) of the Judicial Code, 28 U.S.C. 1346 (a) (1), and this action arises under Section 7422 of the Internal Revenue Code of 1954.

2. Plaintiff is an individual residing in the City of Altadena, County of Los Angeles, State of California.

3. On or about January 31, 1952, the United States of America made an assessment of $4,395.42 against taxpayer for withholding and F.I.C.A. taxes for the fourth quarter of 1951.

[fol. 2] 4. On July 1, 1953, taxpayer filed a voluntary petition in bankruptcy in the Western District of Louisiana, Lake Charles Division. At the time of filing said voluntary petition in bankruptcy taxpayer was indebted to the United States in the aforesaid amount of $4,395.42 covering withholding and F.I.C.A. taxes assessed for the fourth quarter of 1951.

5. Taxpayer was ultimately adjudged a bankrupt but the indebtedness to the United Stafes was not discharged.

6. On May 13, 1958 final payment on account of said assessment of $4,395.42 was made by taxpayer by means

of the crediting to the delinquent account by the Director of Internal Revenue, Pittsburgh, Pennsylvania, of a refund determined to be due taxpayer for income taxes of a year subsequent to taxpayer's adjudication as a bankrupt.

7. Concurrently with the application of the refund of the delinquent account, the United States assessed accrued interest of $1,369.42, which covered the period from the date of the assessment, January 31, 1952, to the date of final payment, March 13, 1958, after giving proper credits for payments previously made on account. Said assessment of interest was paid by a credit of a portion of the refund determined to be due taxpayer for income taxes of a year subsequent to taxpayer's adjudication as a bankrupt.

[fol. 3] 8. On or about June 19, 1959, taxpayer filed a Claim for Refund with the Director of Internal Revenue, Pittsburgh, Pennsylvania for $995.81, representing the interest assessed against taxpayer with respect to the assessment of withholding and F.I.C.A. taxes of $4,395.42, which interest accrued subsequent to July 1, 1953, the date on which taxpayer filed his voluntary petition in bankruptcy. Said assessment of accrued interest is unlawful for the reason that the United States is not entitled to interest after the filing of the petition in bankruptcy.

9. On the basis of plaintiff's Claim for Refund plaintiff is entitled to a refund of $995.81.

10. The Claim for Refund was disallowed in full by the District Director of Internal Revenue and notice of such disallowance was given plaintiff by registered mail on November 23, 1959.

11. The United States of America is now wrongfully and unlawfully withholding from plaintiff without his consent and against his will, the above amount of $995.81, with interest thereof from the 13th day of May, 1958.

[fol. 4] Wherefore, the plaintiff prays for judgment against the United States of America in the sum of $995.81, with interest from the 13th day of May, 1958.

Attorney for Plaintiff.

[fol. 5] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 561-60 WB (Civil)

PAUL F. BRUNING, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

FIRST AMENDED COMPLAINT (FOR RECOVERY OF FEDERAL TAXES)—Filed June 27, 1960

Plaintiff complains of the Defendant and alleges:

I.

This is an action for the recovery of interest on withholding and FICA taxes alleged to have been wrongfully, erroneously and illegally collected from the plaintiff by the defendant for the period subsequent to July 1, 1953, the date on which plaintiff filed a voluntary petition in bankruptcy, [fol. 6] to the date of final payment, March 13, 1958, and is brought under the jurisdiction conferred upon this Court by 28 U.S.C.A. 1346(a)(1).

II.

Plaintiff is an individual residing in the City of Altadena, County of Los Angeles, State of California.

III.

Defendant is a corporate and sovereign body politic.

IV.

On or about January 31, 1952, the United States of America made an assessment of $4,395.42 against taxpayer for withholding and FICA taxes for the fourth quarter of 1951.

V.

On July 1, 1953, taxpayer filed a voluntary petition in bankruptcy in the Western District of Louisiana, Lake Charles Division. At the time of filing said voluntary petition in bankruptcy taxpayer was indebted to the United States in the aforesaid amount of $4,395.42 covering withholding and FICA taxes assessed for the fourth quarter of 1951.

VI.

Taxpayer was ultimately adjudged a bankrupt but the indebtedness to the United States was not discharged.

VII.

On May 13, 1958 final payment on account of said assessment of $4,395.42 was made by taxpayer by means of the [fol. 7] crediting to the delinquent account by the Director of Internal Revenue, Pittsburgh, Pennsylvania, of a refund determined to be due taxpayer for income taxes of a year subsequent to taxpayer's adjudication as a bankrupt.

VIII.

Concurrently with the application of the refund of the delinquent account, the United States assessed accrued interest of $1,369.42, which covered the period from the date of the assessment, January 31, 1952, to the date of final payment, March 13, 1958, after giving proper credits for payments previously made on account. Said assessment of interest was paid by a credit of a portion of the refund determined to be due taxpayer for income taxes of a year subsequent to taxpayer's adjudication as a bankrupty (sic).

IX.

On or about June 19, 1959, taxpayer filed a Claim for Refund (copy of said Claim for Refund is attached marked Exhibit "A") with the Director of Internal Revenue, Pittsburgh, Pennsylvania for $995.81 representing the interest assessed against taxpayer with respect to the assessment of withholding and FICA taxes of $4,395.42, which interest accrued subsequent to July 1, 1953, the date on which taxpayer filed his voluntary petition in bankruptcy. Said assessment of accrued interest is unlawful for the reason that the United States is not entitled to interest after the filing of the petition in bankruptcy.

[fol. 8]

X.

The Claim for Refund (copy of disallowance is attached hereto marked Exhibit "B") was disallowed in full by the District Director of Internal Revenue and notice of such disallowance was given plaintiff by registered mail on November 23, 1959.

XI.

No part of the sum of $995.81 alleged to have been erroneously, wrongfully and illegally collected from plaintiff by the defendant has been repaid, credited or refunded to plaintiff or to anyone for its use. Said sum with interest thereon as provided by law remains outstanding and unpaid to plaintiff by the defendant.

Wherefore, the plaintiff prays for judgment against the United States of America in the sum of $995.81, with interest from the 13th day of May, 1958.

Ernest R. Mortenson, Attorney for Plaintiff

Dated: 23 day of June, 1960.

[fol. 9]

EXHIBIT A TO FIRST AMENDED COMPLAINT

Form 843
(Rev. Mar. 1960)

U. S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

CLAIM

To Be Filed With The District Director Where Assessment Was Made Or Tax Paid

District Director's Stamp
(Date received)

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Please Type or Print Plainly

Name of taxpayer or purchaser of stamps
Paul F. Bruning
Number and street
c/o James G. Marks, Jr., Esq.
1707 Oliver Building
City, town, postal zone, State
Pittsburgh, Pennsylvania

Fill in applicable items—

Attach letter size sheets if space is not sufficient

1. Social security number .....

2. If an employer, enter employer identification number .....

3. District in which return (if any) was filed 23rd Pa.

4. Name and address shown on return, if different from above Paul F. Bruning
812 Washington Avenue, Oakmont, Pennsylvania

5. Period—if for tax reported on annual basis, prepare separate form for each taxable year From ....., 19...., To ....., 19....

6. Kind of tax
Interest on Withholding and F.I.C.A. taxes

7. Amount of assessment $1,369.42
Dates of payment 3-13-58

8. Date stamps were purchased from Government
.....

9. Amount to be refunded $995.81

10. Amount to be abated (not applicable to income, estate, or gift taxes) $.....

11. The claimant believes that this claim should be allowed for the following reasons: SEE RIDER ATTACHED

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed PAUL F. BRUNING
by James G. Marks, Jr.
Attorney in fact

Dated June 18, 1959

INSTRUCTIONS

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, enter social security and employer

identification number, if any, of both husband and wife and each must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

6. If claim is for excess social security (F.I.C.A.) tax withheld as a result of having had more than one employer, include the names and addresses of your employers, and the amount of wages received and taxes withheld by each as part of your explanation in item 11. Do not claim tax withheld if you have claimed the excess withholding on your individual income tax return.

Form 843 (Rev. 3-60)

[fol. 10] RIDER

9. Taxpayer filed a voluntary Petition in Bankruptcy in the Western District of Louisiana, Lake Charles Division, on July 1, 1953. On said date Taxpayer was indebted to the United States in the sum of $4,395.42 for

Withholding and F.I.C.A. taxes assessed for the Fourth Quarter of 1951. Taxpayer was ultimately adjudged a Bankrupt but said tax was not discharged. On May 13, 1958, final payment of said assessment $4,395.42, was made by Taxpayer. Said payment was made by the crediting to the delinquent account a refund determined to be due Taxpayer for income taxes of a year subsequent to his adjudication as a Bankrupt. Concurrently with the application of the refund to said delinquent account, the United States assessed accrued interest of $1,369.42, covering the entire period from the date of assessment (January 31, 1952) to the date of payment (March 13, 1958), after giving proper credit for payments made on account.

Said assessment of accrued interest is unlawful for the reason that the United States is not entitled to interest on their claim after the filing of the Petition in Bankruptcy. United States is entitled to interest for the period from January 31, 1952 to July 1, 1953, which amount is the sum of $373.61. Balance of interest assessed against Taxpayer or $995.81, is properly refundable to Taxpayer.

[fol. 11]

EXHIBIT B TO FIRST AMENDED COMPLAINT

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
U. S. Post Office & Court House Bldg.
Pittsburgh 30, Pa.

November 23, 1959

IN REPLY REFER TO
C:D:S:—FPD

Paul F. Bruning
c/o James G. Marks, Jr.
1707 Oliver Building
Pittsburgh, Pa.

(IN RE: CLAIM FOR REFUND OF
($995.81
(FOR THE PERIOD
(WT-FIC—4th Qu. 1951

Dear Sir:

In accordance with the provisions of existing internal revenue laws, this notice of disallowance in full of your claim or claims is hereby given.

No suit or proceeding in any court for the recovery of any internal revenue tax, penalty, or other sum which is a part of the claim for which this notice of disallowance is issued, may be begun after the expiration of two years from the date of mailing of this letter.

Very truly yours,

JOHN H. BINGLER
John H. Bingler
District Director

[fol. 12]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 561-60 WB Civil

[Title omitted]

ANSWER TO FIRST AMENDED COMPLAINT—
Received September 2, 1960

Comes Now the defendant, United States of America, and in answer to the first amended complaint, admits, denies, and alleges as follows:

1. Admits the allegations contained in paragraph I, except denies that the said interest was either wrongfully or erroneously or illegally collected from the plaintiff by the defendant.

[fol. 13] 2. Admits the allegations contained in paragraph II thereof.

3. Admits the allegations contained in paragraph III thereof.

4. Admits the allegations contained in paragraph IV, except that said assessment was made on April 22, 1952, rather than January 31, 1952.

5. Admits the allegations contained in paragraph V thereof.

6. Admits the allegations contained in paragraph VI thereof.

7. Admits the allegations contained in paragraph VII thereof.

8. Admits the allegations contained in paragraph VIII thereof.

9. Denies the allegations contained in paragraph IX thereof and "Exhibit A" attached thereto, except that

plaintiff on June 22, 1959, filed a claim for refund of $995.81, representing interest assessed against plaintiff with respect to the assessment of Withholding and FICA taxes of $4,395.42. All allegations contained in said "Exhibit A" are denied, except insofar as they are specifically admitted in this answer.

10. Admits the allegations contained in paragraph X thereof.

[fol. 14] 11. Denies the allegations contained in paragraph XI, except admits that no part of said sum of $995.81 collected from plaintiff by defendant has been repaid, credited, or refunded to plaintiff or to anyone for his use.

Wherefore, defendant prays that the plaintiff take nothing by his action, that the first amended complaint be dismissed with prejudice, and defendant have its costs in its behalf expended.

Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, Edward R. McHale, Attorneys for Defendant, United States of America.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 561-60 WB Civil

[Title omitted]

PRE-TRIAL ORDER—December 19, 1960
(Local Rule (9)(j))

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, It Is Ordered:

I. This is an action for:

(A) The recovery of interest paid on Federal Withholding and FICA taxes, alleged by the plaintiff to have been illegally and erroneously collected from him by the defendant on March 13, 1958, which interest accrued for the period after plaintiff filed a petition in bankruptcy.

[fol. 16] (B) The action is based on a claim for refund filed by the plaintiff with defendant on June 22, 1959, which was disallowed by the defendant on November 23, 1959.

(C) The issues are raised by the First Amended Complaint and the Answer to the First Amended Complaint.

II. Federal jurisdiction is invoked on the ground:

(A) Plaintiff alleges the illegal and erroneous collection of interest from him on March 13, 1958; the filing of a claim for refund therefor with the defendant on June 19, 1959; the disallowance by defendant of said claim for refund on November 23, 1959; and the plaintiff filed a first amended complaint for the recovery of

said interest in the sum of $995.81, in the United States District Court for the Southern District of California on June 27, 1960.

(B) Jurisdiction is conferred on this Court by Section 1346(a)(1) of Title 28, U. S. Code.

(C) At the time of filing the First Amended Complaint on June 27, 1960, in the Southern District of California, and at the time of the making of personal service of summons and first amended complaint upon defendant, the plaintiff was an individual residing in the City of Altadena, County of Los Angeles, State of California, within the Southern District of California, Central Division.

[fol. 17] III. The following facts are admitted, and require no proof:

(A) Plaintiff Paul F. Bruning, doing business in Louisiana as Bruning Construction Co., sometimes herein referred to as "taxpayer," incurred Withholding and FICA taxes for the fourth quarter 1951, in the sum of $4,169.15; said taxes were neither paid when due on January 31, 1952, nor was a return therefor timely filed.

(B) A delinquent Employer's Quarterly Federal Tax Return was filed by the taxpayer on February 13, 1952 showing said tax liability unaccompanied by any payment.

(C) On March 3, 1952, said tax of $4,169.15, together with a statutory addition to the tax of five per cent, $208.46, for late filing, and interest of $17.81 was assessed against the taxpayer in the sum of $4,395.42.

(D) Notice and demand for the payment of said assessment was made upon the taxpayer on March 20, 1952, and on June 2, 1952 a Notice of Tax Lien for said tax was filed with the Clerk of Acadia Parish, Crowley, Louisiana as No. 8311.

(E) With respect to said assessment, the taxpayer made the following payments prior to bankruptcy:

October	20, 1952	$886.05
April	6, 1953	300.00
May	18, 1953	100.00

[fol. 18] (F) On July 6, 1953, a voluntary petition in bankruptcy under Chapters I to VII of the Bankruptcy Act was filed by the taxpayer in the Western District of Louisiana, Docket No. 7240, and he was adjudicated a bankrupt on the same day.

(G) On January 11, 1954, the District Director of Internal Revenue at New Orleans, Louisiana, filed a claim in said bankruptcy for said assessment, together with other taxes not material herein.

(H) In said bankruptcy proceedings, no dividend was paid to the general creditors, and payment of a dividend on priority claims, including taxes, was prorated. The United States received a distribution in the sum of $701.32, from the bankruptcy estate on July 10, 1956, which was applied to said assessment.

(I) On October 29, 1953 the taxpayer was granted a discharge in bankruptcy.

(J) The Bankruptcy Court closed the case on June 29, 1954.

(K) The taxpayer filed claims for refund of his income taxes paid for the calendar year 1953 on February 11, 1957, and for the calendar year 1954 on May 10, 1957. Subsequently, said claims for refund of income taxes were audited and taxpayer was allowed a net operating loss which gave rise to a deduction, and thus, a credit of $857.55 of income taxes and [fol. 19] interest paid for the year 1953, and

$3,382.62 of income taxes and interest paid for the year 1954.

(L) On March 7, 1958, the Director of Internal Revenue at Pittsburgh, Pennsylvania, scheduled said credits and applied the $857.55 of the 1953 income tax overpayment, and $2,919.92 of the 1954 income tax overpayment, against the balance of said assessment of Withholding and FICA taxes for the fourth quarter 1951 plus accrued interest and additions to tax computed to that date (the balance of said credit for 1954 income taxes was applied against other liabilities of the plaintiff and is not in issue here).

(M) Of the sum of $3,777.47 thus applied by the District Director on March 7, 1958 against the assessment for Withholding and FICA taxes for the fourth quarter 1951 and the interest and additions thereto, the sum of $40.40 was incorrectly so applied and is admitted and conceded by defendant to be an overpayment.

(N) The interest which accrued on the balance of the assessment, from July 6, 1953, the date of the filing of petition in bankruptcy, to March 7, 1958, the date of payment by scheduling the credits for overassessments of income taxes and interest, is $795.40.

(O) The amount of interest which accrued on the sum of $701.32, the dividend paid from the [fol. 20] bankruptcy estate on July 10, 1956, between July 6, 1953, the date of filing the petition, and said date of payment is $125.74.

(P) On June 22, 1959, plaintiff filed a claim for refund of the interest of $995.81 he claimed was unlawfully accrued and assessed on the aforesaid assessment of Withholding and FICA taxes for the fourth quarter 1951 between the date of bankruptcy and the date of payment.

The claim for refund was disallowed on November 23, 1959, and this action was commenced within two years thereafter.

(Q) The overassessments of income taxes for the calendar years 1953 and 1954, which taxes did not become due until March 15, 1954, and April 15, 1955, respectively, were not the property of the bankrupt at the time of filing and adjudication of bankruptcy.

IV. The reservations as to the facts recited in paragraph III above are as follows:

(A) Plaintiff admits the computations set forth in paragraphs III(N) and III(O) are correct, but denies that as a matter of law interest in those amounts accrued in the periods shown therein.

V. There are no facts in the category of not admitted but not to be contested at the trial by evidence to the contrary.

[fol. 21] VI. There are no issues of fact remaining to be litigated upon the trial.

VII. There are no exhibits to be offered at the trial except this Pre-Trial Conference Order containing the stipulations of facts of the parties.

VIII. The following issues of law, and no others, remain to be litigated upon the trial.

(A) Whether interest of $795.40 accrued on the balance of the assessment of Withholding and FICA taxes between the date of filing of the petition in bankruptcy and the date of payment after bankruptcy, and was legally collected from the taxpayer's own assets acquired by him after filing his petition in bankruptcy.

(B) In the alternative, whether interest of $125.74 accrued on that portion of the assessment of

Withholding and FICA taxes satisfied by the bankruptcy dividend of $701.32, between the date of filing of the bankruptcy petition and the date of payment by the bankruptcy estate of said dividend, and was legally collected from the taxpayer's own assets acquired by him after filing his petition in bankruptcy.

IX. The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings [fol. 22] and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: December 19, 1960.

William M. Byrne, United States District Judge.

Approved as to Form and Content

Ernest R. Mortenson, Attorney for Plaintiff.

Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, Edward R. McHale, Attorneys for Defendant.

[fol. 23] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 561-60 WB

PAUL F. BRUNING, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

MEMORANDUM OF DECISION—Filed April 10, 1961

Plaintiff incurred liability for withholding and Social Security taxes as an employer for the fourth quarter of the

year 1951, but failed to pay more than a portion of this liability. On July 6, 1953, he filed a voluntary petition in bankruptcy and was on the same day adjudicated a bankrupt. The District Director of Internal Revenue filed a claim in the bankruptcy proceedings for the delinquent taxes. No dividend was received by the general creditors in the bankruptcy proceedings and the dividend received by the defendant on its priority claim for taxes was only a fraction of the assessed amount. Plaintiff was granted a discharge in bankruptcy on October 29, 1953.

[fol. 24]. In 1957 plaintiff filed claims for the refund of his income taxes paid for the years 1953 and 1954. These claims were audited and plaintiff was allowed a net operating loss which gave rise to a deduction and thus a credit for income taxes and interest paid for the years 1953 and 1954.

On March 7, 1958, the Director of Internal Revenue applied the entire 1953 credit and a part of the 1954 credit against the balance of the assessment of the withholding and FICA taxes for the fourth quarter of 1951 plus accrued interest and additions to tax computed to that date. Of the amount so applied, a portion was allotted to the interest and additions to taxes accrued to that date. (Defendant concedes errors in the computation of interest which will give plaintiff an overpayment of $40.40 in any event.) The amount of interest which had accrued during the period between the filing of petition in bankruptcy on July 6, 1953, and the date of credit March 7, 1958, was $795.40, and is the amount involved in this action.

The plaintiff has satisfied all jurisdictional prerequisites to this suit for refund, having paid the post-petition interest, filed a claim for refund, and the refund having been denied.

The question for determination is whether interest on delinquent taxes claimed in the bankruptcy estate accrues after the filing of a petition in bankruptcy and is collectible from the taxpayer himself, who is discharged in bankruptcy. [fol. 25] Both parties agree that such interest does not accrue on the claim *against the estate*. The narrow question presented is whether the interest may be collected from the taxpayer himself, by resorting to after-acquired assets or property exempt from the bankruptcy proceedings.

Plaintiff relies on the case of *City of New York* vs. *Saper*, 336 U. S. 328, 69 S. Ct. 554, 93 L. Ed. 710, where the Supreme Court held that tax claims against a *bankruptcy estate* bear interest only until the date of bankruptcy, not until payment. The Court's rationale appears at pages 330-332 of 336 U. S.:

> "... More than forty years ago Mr. Justice Holmes wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. He said the rule was not a matter of legislative command or statutory construction but, rather, a fundamental principle of the English bankruptcy system which we copied. Sexton v. Dreyfus, 219 U. S. 339, 344. Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every [fol. 26] logical implication from relevant provisions is to the contrary. Section 63(a)(1), 11 U.S.C. §103(a)(1) allows interest on judgments only to date of bankruptcy. Section 63(a)(5), 11 U.S.C. §103(a)(5) allows interest only to that date on debts reduced to judgment after bankruptcy. No provision permits post-bankruptcy interest on other claims in general or tax claims in particular. Section 57(j), 11 U.S.C. §93(j), forbidding allowance of government penalties for forfeitures, permits allowance of losses sustained by the acts penalized, with actual costs and 'such interest as may have accrued thereon according to law'. However, on its face this appears to delimit even such allowable debts as of the date of bankruptcy and to allow no more interest than does §63 with respect to the claims there specified. Moreover, there is no interest except that which accrues according to law—it is exactly such interest that the 'fundamental principle' cuts off as of bankruptcy. Section 57(n), 11 U.S.C. §93(n) requires governmental claims to be proved in the same manner [fol. 27] and within the same time as other debts and only for cause shown may a reasonable extension be granted. Tax claims are treated the same as other debts except for the fourth priority of payment, §64(a),

11 U.S.C. §104(a), and the provision making taxes nondischargeable, §17, 11 U.S.C. §35. But each of these sections is silent as to interest.

"The long-standing rule against post-bankruptcy interest appears implicit in our current Bankruptcy Act. To read into such a statute an exception to that rule would be unwarranted and, as an original proposition, we should decline to do so . . . ."

The plaintiff's reliance appears misplaced, as the question here at issue was not considered in the *Saper* case, which involved interest on an unliened tax claim of the City of New York which the City attempted to collect from the *bankruptcy estate*, not from the taxpayer. The instant case concerns the liability of the taxpayer himself for such interest when collected from the taxpayer's assets acquired *after bankruptcy*. The *Saper* principle that tax claims against a bankrupt bear interest only until the date of bankruptcy, not until payment, has been applied by three [fol. 28] Circuit Courts including our own, (*U. S.* vs. *Bass*, 271 F. 2d 129 (CA 9); *U. S.* vs. *Harrington*, 269 F. 2d 719 (CA 4); *In re Kerber Packing Co.*, 276 F. 2d 245 (CA 7)) and is the settled law, but it is not dispositive of this case.

The Tenth Circuit case of *U. S.* vs. *Mighell*, 273 F. 2d 682, would seem to support the plaintiff's position, as it affirmed the right of the lower court to enjoin the collection of post-petition interest on lien claims from the debtor himself after his discharge. In citing *U. S.* vs. *Bass*, supra, and *U. S.* vs. *Harrington*, supra, the *Mighell* court stated, "This contention of the United States has been rejected and post-bankruptcy interest on liened tax claims denied. As we agree with those decisions, no good purpose would be gained by going over the same ground that they have covered adequately."

This conclusion rests, I believe, on a wholly unwarranted dependence on *Bass* and *Harrington*. It disregards the only issue that was before the court in each of those cases, and thereby misconceives the holding in each. Both *Bass* and *Harrington* were concerned with the issue of the *obligation of the bankruptcy estate* for post-petition interest on tax claims sought to be *proved and allowed in the estate*.

It is true that both courts denied "post-bankruptcy interest on liened tax claims", but it was interest sought to be allowed and *collected from the estate,* not from the tax- [fol. 29] payer. These courts both followed the Supreme Court holding in the *Saper* and *Dreyfus* cases that inherent in our bankruptcy law is a fundamental principle, taken from the English system, *viz.* the cutting off of interest *against the estate* at the time of bankruptcy. It does not follow that this interest may not be collected from the taxpayer after his discharge in bankruptcy when the other creditors are unaffected.

It is clear from *Bass* and *Harrington,* as well as *Saper* and *Dreyfus,* that the phrases "everything stops at a certain date", "interest cut off as of bankruptcy", relate to the obligations of the *bankruptcy estate* and not to those of the taxpayer. For example, if the estate turns out to be solvent and there is a surplus after the payment of all creditors' claims, the surplus *is applied to creditors' claims for interest,* and not returned to the debtor. See also *Beecher* vs. *Leavenworth State Bank,* 192 F. 2d 10 (CA 9) to the same effect. That the purpose of the "cut off" rule is to preserve the estate is made manifest by the *Beecher* court in stating, "There is just as much danger of *eating up the bankrupt's estate* with interest on claims arising after the date of bankruptcy as with interest on claims arising before the date of bankruptcy. Consequently, the allowance of interest on these supplemental claims must be modified in the same manner as the other secured claims." (emphasis supplied)

[fol. 30] The *Saper* case (336 U.S. at page 338) cited *American Iron Co.* vs. *Seaboard Air Line,* 233 U.S. 261, as stating the correct rule. The latter case held (233 U.S. at pages 266, 267) that the rule stopping interest from accruing against the estate "did not prevent the running of interest" and cited with approval *Johnson* vs. *Norris,* 190 F. 459, where the court stated at page 463, "It is true, as a general rule, that, where property of an insolvent passes into the hands of the court, subsequently accruing interest is not allowed against the fund (citing case). This principle is applied *as between creditors claiming the fund.*" (emphasis supplied)

The Internal Revenue Code of 1939 governs the liability for interest on taxes[1] and provides that in case of delinquency there *shall be added as part of the tax,* interest at the rate of six per centum per annum from the date the tax became due until paid. The Code provides that a lien arises with respect to any delinquent tax, that it includes interest and "shall continues until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time".[2]

The Bankruptcy Act expressly excepts taxes from discharge[3] and the clear language of the revenue statute *adds* [fol. 31] *interest to the tax.* The result is that interest added to the tax is excepted from discharge. There is nothing in the Bankruptcy Act, the Internal Revenue Code or the "fundamental principle of the English bankruptcy system" which should compel or permit a contrary conclusion.

Dated April ..... 1961.

Wm. M. Byrne, United States District Judge.

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[1] §§ 1623, 1627, 1420(b).

[2] §§ 3670, 3671.

[3] § 17 (11 U.S.C.A. 35).

[fol. 32] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 561-60 WB Civil

PAUL E. BRUNING, Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT
—April 19, 1961

The above-entitled case came on regularly for trial on March 20, 1961, at 2:00 P.M., before the Honorable Wm. M. Byrne, United States District Judge, presiding without a jury, plaintiff represented by his attorney, Ernest R. Mortenson, Esq., the defendant by its attorneys, Laughlin E. Waters, United States Attorney, and Edward R. McHale, [fol. 33] Assistant United States Attorney, Chief, Tax Division, and the Court, having considered the stipulated evidence contained in the Pre-Trial Order of December 19, 1960, the briefs and oral arguments of the parties, and having filed herein on April 10, 1961 its Memorandum of Decision, now finds as follows:

Findings of Fact

1. This is an action for the recovery of interest paid on Federal Withholding and FICA taxes, alleged by the plaintiff to have been illegally and erroneously collected from him by the defendant on March 13, 1958, which interest accrued for the period after plaintiff filed a petition in bankruptcy.

2. The action is based on a claim for refund filed by the plaintiff with defendant on June 22, 1959, which was disallowed by the defendant on November 23, 1959.

3. Federal jurisdiction was invoked on the grounds:

a. Plaintiff alleged the illegal and erroneous collection of interest from him on March 13, 1958; the filing of a claim for refund therefor with the defendant on June 19, 1959; the disallowance by defendant of said claim for refund on November 23, 1959; and the plaintiff filed a first amended complaint for the recovery of said interest in the sum of $995.81, in the United States District Court for the Southern District of California on June 27, 1960.

[fol. 34] b. Jurisdiction is conferred on this Court by Section 1346(a)(1) of Title 28, U. S. Code.

c. Plaintiff commenced this action by the filing of a complaint in the United States District Court for the Western District of Pennsylvania, which Court transferred the action to the United States District Court for the Southern District of California, Central Division, because plaintiff was a resident of this district. At the time of filing the First Amended Complaint on June 27, 1960, in the Southern District of California, and at the time of the making of personal service of summons and first amended complaint upon defendant, the plaintiff was an individual residing in the area of Altadena, County of Los Angeles, State of California, within the Southern District of California, Central Division.

4. Plaintiff Paul F. Bruning, doing business in Louisiana as Bruning Construction Co., sometimes herein referred to as "taxpayer", incurred Withholding and FICA taxes for the fourth quarter 1951, in the sum of $4,169.15; said taxes were neither paid when due on January 31, 1952, nor was a return therefor timely filed.

5. A delinquent Employer's Quarterly Federal Tax Return was filed by the taxpayer on February 13, 1952 showing said tax liability unaccompanied by any payment.

[fol. 35] 6. On March 3, 1952, said tax of $4,169.15, together with a statutory addition to the tax of five per cent, $208.46, for late filing, and interest of $17.81 was assessed against the taxpayer in the sum of $4,395.42.

7. Notice and demand for the payment of said assessment was made upon the taxpayer on March 20, 1952, and on June 2, 1952 a Notice of Tax Lien for said tax was filed with the Clerk of Acadia Parish, Crowley, Louisiana as No. 8311.

8. With respect to said assessment, the taxpayer made the following payments prior to bankruptcy:

October 20, 1952	$866.05
April 6, 1953	300.00
May 18, 1953	100.00

9. On July 6, 1953, a voluntary petition in bankruptcy under Chapters I to VII of the Bankruptcy Act was filed by the taxpayer in the Western District of Louisiana, Docket No. 7240, and he was adjudicated a bankrupt on the same day.

10. On January 11, 1954, the District Director of Internal Revenue at New Orleans, Louisiana, filed a claim in said bankruptcy for said assessment, together with other taxes not material herein.

11. In said bankruptcy proceedings, no dividend was paid to the general creditors, and payment of a dividend on priority claims, including taxes, was prorated. The United [fol. 36] States received a distribution in the sum of $701.32, from the bankruptcy estate on July 10, 1956, which was applied to said assessment.

12. On October 29, 1953 the taxpayer was granted a discharge in bankruptcy.

13. The Bankruptcy Court closed the case on June 29, 1954.

14. The taxpayer filed claims for refund of his income taxes paid for the calendar year 1953 on February 11, 1957, and for the calendar year 1954 on May 10, 1957. Subsequently, said claims for refund of income taxes were audited and taxpayer was allowed a net operating loss which gave rise to a deduction, and thus, a credit of $857.55 of income taxes and interest paid for the year 1953, and $3,382.62 of income taxes and interest paid for the year 1954.

15. On March 7, 1958, the Director of Internal Revenue at Pittsburgh, Pennsylvania, scheduled said credits and applied the $857.55 of the 1953 income tax overpayment, and $2,919.92 of the 1954 income tax overpayment, against the balance of said assessment of Withholding and FICA taxes for the fourth quarter 1951 plus accrued interest and additions to tax computed to that date (the balance of said credit for 1954 income taxes was applied against other liabilities of the plaintiff and was not in issue here).

16. Of the sum of $3,777.47 thus applied by the District Director on March 7, 1958 against the assessment for With- [fol. 37] holding and FICA taxes for the fourth quarter 1951 and the interest and additions thereto, the sum of $40.40 was incorrectly so applied and is admitted and conceded by defendant to be an overpayment.

17. The interest which accrued on the balance of the assessment, from July 6, 1953, the date of the filing of petition in bankruptcy, to March 7, 1958, the date of payment by scheduling the credits for overassessments of income taxes and interest, is $795.40.

18. The amount of interest which accrued on the sum of $701.32, the dividend paid from the bankruptcy estate on July 10, 1956, between July 6, 1953, the date of filing the petition, and said date of payment, is $125.74.

19. On June 22, 1959, plaintiff filed a claim for refund of the interest of $995.81 he claimed was unlawfully accrued and assessed on the aforesaid assessment of Withholding and FICA taxes for the fourth quarter 1951 between the date of bankruptcy and the date of payment. The claim for refund was disallowed on November 23, 1959, and this action was commenced within two years thereafter.

20. The overassessments of income taxes for the calendar years 1953 and 1954, which taxes did not become due until March 15, 1954, and April 15, 1955, respectively, were not the property of the bankrupt at the time of filing and adjudication of bankruptcy.

[fol. 38] 21. Neither the filing of the petition in bankruptcy, the adjudication of plaintiff as bankrupt, nor his

discharge in bankruptcy affected, postponed, diminished or discharged his liability for interest in the sum of $745.90 on the taxes due the United States, and they were properly and legally collected from him by the defendant.

22. Plaintiff has overpaid interest on the assessment of taxes herein involved only in the conceded sum of $40.40 and is entitled to a judgment of refund thereof together with interest thereon as provided by law and for his costs.

And from the foregoing facts, the Court concludes as follows:

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter of the controversy.

2. Interest on taxes is added as a part of the tax at the rate of six per centum per annum from the date the tax becomes due until paid.

3. Taxes due the United States are expressly excepted from discharge in bankruptcy and this includes as well interest which is added as a part of the tax.

4. Interest of $795.40 accrued on the balance of the assessment of withholding and FICA taxes between the date of filing plaintiff's petition in bankruptcy and March 7, [fol. 39] 1958, the date of scheduling credits against said liability after bankruptcy.

5. Said accrued interest of $795.40 was legally and properly collected by defendant from taxpayer's own assets acquired by him after filing his petition in bankruptcy.

6. Plaintiff overpaid interest in the conceded amount of $40.40 only and is entitled to judgment of a refund thereof, together with interest thereon from March 7, 1958, as provided by law, and for his costs.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is ordered, adjudged and decreed that plaintiff have judgment against defendant in the amount of

$40.40 together with interest on said sum at the rate of six per centum per annum from March 7, 1958 until a date preceding the issuance of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue, and for his costs in the sum of $..... to be taxed by the Clerk of the Court.

Dated: April 19, 1961.

William M. Byrne, United States District Judge.

[fol. 40] 1. Approved as to form.

2. Disapproved as to form,

3. Receipt is acknowledged of copy of the within document this 13th day of April, 1961, at 1:00 P. M.

Ernest R. Mortenson, Attorney for Plaintiff.

[fol. 41]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 561-60-WB-Civil

[Title omitted]

NOTICE OF APPEAL—June 5, 1961

Notice is hereby given that Paul F. Bruning, the plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 19, 1961.

Dated: 5th day of June, 1961.

Ernest R. Mortenson, Attorney for Plaintiff.

[fol. 42]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 561-60-WB Civil

[Title omitted]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL—Filed June 14, 1961

Plaintiff-Appellant, Paul F. Bruning, herewith sets forth a concise statement of the points on which he intends to rely on appeal, viz:

I.

The District Court erroneously found and held that interest which accrued upon the Appellant's withholding and FICA taxes subsequent to the date of his filing a Petition [fol. 43] in Bankruptcy was properly collected from assets of the taxpayer acquired by him subsequent to the filing of his Petition in Bankruptcy.

Ernest R. Mortenson, Attorney for Plaintiff.

Dated: 14th day of June 1961.

[fol. 44] Designation of Contents of Record on Appeal—July 14, 1961 (omitted in printing).

[fol. 45] Attorney's Certification to Record (omitted in printing).

[fol. 47] Minute Entry of Argument and Submission—February 9, 1962 (omitted in printing).

[fol. 48] Minute Entry of Order Directing Filing of Opinion and Filing and Recording of Judgment—May 3, 1963 (omitted in printing).

[fol. 49]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,445

PAUL F. BRUNING, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division

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OPINION—May 3, 1963

Before: Chambers and Barnes, Circuit Judges.[1]

Chambers, Circuit Judge:

Paul F. Bruning has been through bankruptcy. At adjudication one of his debts was to the United States for withholding and social security taxes for the fourth quarter of the year 1951. The government participated in the bankruptcy estate, but its claim was only partially satisfied on distribution.

Bruning is entitled to an income tax refund for later years unless the government can offset the refund by charging him post bankruptcy interest (that is, after adjudication). The case gets into court because Bruning has filed claims with the director of internal revenue for a refund which were denied.[2] So he sought in the district court to

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[1] John R. Ross, United States district judge for the District of Nevada, was the third member of the division which heard the arguments. His death occurred on April 22, 1963. Therefore, he has not participated in the decision herein.

[2] As of the date of adjudication of bankruptcy on July 6, 1953, the principal balance on the unpaid taxes was about $3,000.00. This was reduced by about $700.00 by a distribution in the estate.

obtain the money from the United States. This he was [fol. 50] denied by the district court. Bruning v. United States, 192 F. Supp. 826. Although it probably sets up a conflict with United States v. Mighell, 10 Cir., 273 F.2d 682, we choose to follow our trial court's decision.

Section 17 a. of the Bankruptcy Act (11 U.S.C. § 35 a.) provides as follows:

> "DEBTS NOT AFFECTED BY A DISCHARGE.—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for willful and malicious injuries to the person of property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; or (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of an employee received or retained by his employer, to secure the faithful performance by such employee of the terms of a contract of employment."

Appellant Bruning does not question the director's right to deduct the principal balance from his refund. What is at issue in this case is the right of the director to deduct about $800.00 in post bankruptcy interest.

Obviously, under the above section insofar as the principal amount of tax debt was not satisfied out of the bankruptcy estate, the taxpayer would remain liable after his discharge.

[fol. 51] It is well settled that as between the tax collector and the bankrupt estate that interest is suspended[3] as of the time of adjudication, City of New York v. Saper, 336 U.S. 328; United States v. Bass, 9 Cir., 271 F.2d 719; and In Re Kerber Packing Co., 7 Cir., 276 F.2d 2[illegible] But if the estate is adequate and more to pay all claims which had accrued (including interest) as of the date of the bankruptcy then as between the debtor and the creditors, the latter get from the estate post bankruptcy interest. So even in the estate post bankruptcy interest is not gone for all purposes. American Iron Co. v. Seaboard Air Line, 233 U.S. 261; Brown v. Leo, 2 Cir., 34 F.2d 127.[4]

Some of the cases denying relief for the extra interest out of the estate do speak of compassion for the debtor or of what will restore the debtor's economic health. For example, see National Foundry Company of N.Y. v. Director of Internal Revenue, 2 Cir., 229 F.2d 149. But if paying interest on one's taxes after discharge is inimical to an ex-bankrupt's health, so is the payment of any balance of principal.

Section 17 a. is not a compassionate section for debtors. Congress, speaking for society, has decided that the problems of others: the government, the abandoned-dependent wife, the defrauded widow override the value of giving the debtor a wholly new start in life.

There is language in City of New York v. Saper, trustee, supra, which is favorable to appellant here, but we think the holding, based upon the internal arrangements of the bankruptcy estate, does not require us to reverse. Further, we believe our ruling consistent with our bankruptcy estate decision of United States v. Bass, supra.

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[3] One exception of course is negotiated security transactions. To the extent the security is adequate, interest is allowed against the res of the security during administration. Palo Alto Mutual Savings and Loan Ass'n v. Williams, 9 Cir., 1957, 247 F.2d 777.

[4] Provable claims in bankruptcy are covered by Section 63 of the Act (11 U.S.C. § 103).

This opinion need not be further continued to restate in a different way the published opinion of Bruning's case in the trial court cited hereinabove.

[fol. 52] Legislation is not our business. It may well be that with taxes reaching a position of dominance in the whole bankruptcy field, when the government gives away so much, it ought to give away after bankruptcy the interest on its taxes. Maybe Congress should say so clearly. But if we did so would we not give away the interest of him who was defrauded, the victim of the willful and brutal injury, those who lost by embezzlement? Perhaps we could waive the interest of the holders of judgment for breaches of promises to marry without too many qualms. But how could we choose among the beneficiaries of Section 17 a.? It must be admitted that taxes and more taxes so overshadow by general weight and burden the other protected debts of 17 a. and that in most cases to talk of the other nondischargeable debts is often theory. But the section was written on a day other than today.

Affirmed.

[File endorsement omitted]

[fol. 53]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,445

PAUL F. BRUNING, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—May 3, 1963

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the

Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 3, 1963

[fol. 54] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 55]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1963

PAUL F. BRUNING, Petitioner,

vs.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—August 2, 1963

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

September 2, 1963

Byron R. White, Associate Justice of the Supreme Court of the United States.

Dated this 2nd day of August, 1963

[fol. 56]

SUPREME COURT OF THE UNITED STATES

No. 423—October Term, 1963

PAUL F. BRUNING, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—November 18, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Office-Supreme Court, U.S.
FILED
AUG 30 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962
No. 423

PAUL F. BRUNING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ERNEST R. MORTENSON,
961 East Green Street,
Pasadena, California,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1962
No. .....

PAUL F. BRUNING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 3, 1963.

Citations to Opinions Below.

The opinion of the United States District Court is reported as *Bruning v. United States,* 192 Fed. Supp. 826 and the opinion of the United States Court of Appeals for the Ninth Circuit is reported at ..... F. 2d ....., 11 AFTR 2d 1443. The opinions of the United States District Court and the Circuit Court of Appeals are printed in Appendix B hereto.

Jurisdiction.

The judgment of the Court of Appeals was entered May 3, 1963. On August 2, 1963 Justice Byron R. White issued an order extending the time to file this petition to September 2, 1963. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

Whether Petitioner Is Liable to Pay Interest on His Federal Tax Liability Accrued Subsequent to the Date of His Being Adjudicated Bankrupt Out of His Own Assets Acquired Subsequent to the Adjudication of Bankruptcy.

Statutes Involved.

The statutory provisions involved are §6873(a) Internal Revenue Code of 1954 (26 U. S. C. A. 6873(a)), §57(j)(n) Bankruptcy Act (11 U. S. C. A. 93 j.n.) and §17(a)(1) Bankruptcy Act (11 U. S. C. A. 35 (a)(1)). They are printed in the Appendix A hereto.

Statement.

Petitioner, doing business in the state of Louisiana as Bruning Construction Company, incurred withholding and federal insurance contributions taxes during the fourth quarter of the year 1951 but failed to pay said taxes when due. In March, 1952, an assessment was made against petitioner. On July 6, 1953, petitioner filed a voluntary petition in bankruptcy and was on that same day adjudicated a bankrupt in the Western District of Louisiana. The District Director of Internal Revenue at New Orleans filed a claim in the bankruptcy proceedings for said assessment. No dividend was received by the general creditors in the bankruptcy pro-

ceeding and the dividend on priority claims, including taxes; was prorated. The United States received a small distribution which was applied to said assessment. The petitioner was granted a discharge in bankruptcy in October, 1953, and the case was closed in June, 1954.

Certain adjustments were made with regard to the assessment by virtue of payments and credits. On June 22, 1959 petitioner filed a claim for refund of $955.81 which he claimed was unlawfully accrued as interest between the date of his bankruptcy on July 6, 1953 and March 7, 1958, the day of the final payment of withholding and FICA taxes assessed for the fourth quarter of 1951. The claim for refund was rejected and action timely commenced within a two year period. The amount in dispute was later reduced from $955.81 to $795.40.

Reasons for Granting the Writ.

(1) The decision of the Court below in the instant case is directly in conflict with the decision of the Tenth Circuit Court of Appeals in *United States v. Mighell*, 273 F. 2d 682, 5 AFTR 2d 473. This conflict was conceded in the Court below in the following words: "Although it probably sets up a conflict with *United States v. Mighell*, 10 Cir., 273 F. 2d 682, we choose to follow our trial Court's decision."

(2) The issue presented is clearly one of importance in the administration of the tax laws of the federal government and of the states and their subdivisions. Settlement of the question is plainly in the public interest, since it is likely to be presented in almost every case where there is an unsatisfied claim for taxes asserted by the federal government or a state or subdivision thereof in a bankruptcy proceeding.

While the petitioner has no official data available it is believed that hundreds of cases are now pending which involve tax claims of the federal government, states and subdivisions thereof in bankruptcy proceedings.

(3) The decision below is believed to be erroneous and not only in conflict with the decision of the Tenth Circuit in *United States v. Mighell, supra,* but it appears also to be in conflict with the holding of this Court in *City of New York v. Saper,* 69 S. Ct. 554, 336 U. S. 328 for the reasons given below.

The Government concedes that post-bankruptcy interest cannot be recovered against the bankrupt's estate but wishes to reinstate interest so that it can reach after acquired assets of the bankrupt. There is nothing in logic, the bankruptcy laws or the tax laws to support such a proposition.

United States v. Mighell, supra, is on all fours with the case at bar. The Director of Internal Revenue was enjoined from asserting any claim against the bankrupts for interest accruing subsequent to the Petition in Bankruptcy. The Tenth Circuit, in affirming, said:

> "In the National Foundry case it was said that proceedings to collect were 'at best futile, at worst inimical to the future welfare of the newly reorganized corporation.' That statement applies here. *There is no significant distinction between a reorganized corporation struggling to regain financial health and an individual seeking relief from overburdensome debts.* The issuance of the injunctive order in the circumstances of this case was not an abuse of discretion." (5 AFTR 2d 475). (Emphasis supplied).

In the *Saper* case, *supra*, Mr. Justice Jackson, who had, previous to his appointment to the Supreme Court, been the Chief Counsel of the Bureau of Internal Revenue, by way of preface to the Opinion reviewed the development of the rule concerning post-bankruptcy interest as follows:

> "If the question were one of first impression to be decided in the light of the present statute alone, we should have no difficulty in affirming the court below. More than forty years ago, Mr. Justice Holmes wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. He said the rule was not a matter of legislative command or statutory construction but, rather, a fundamental principle of the English bankruptcy system which we copied.
>
> * * * * *
>
> Section 63, sub. a(5), 11 USC §103, sub. a(5), 11 USCA §103, sub. a(5), allows interest only to that date on debts reduced to judgment after bankruptcy. *No provision permits post-bankruptcy interest on other claims in general or tax claims in particular.* Section 57, sub. j, 11 USC §93, sub. j, 11 USCA §93, sub. j, forbidding allowance of governmental penalties or forfeitures permits allowance of losses sustained by the acts penalized, with actual costs and 'such interest as may have accrued thereon according to law'. However, on its face this appears to delimit even such allowable debts as of the date of bankruptcy and to allow no more interest than does §63 with respect to the claims there specified. *Moreover, there is no in-*

terest except that which accrues according to law—it is exactly such interest that the 'fundamental principle' cuts off as of bankruptcy." (Emphasis supplied.)

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated August 27, 1963.

Respectfully submitted,

ERNEST R. MORTENSON,
Attorney for Petitioner.

APPENDIX A.

§6873(a) Internal Revenue Code of 1954 (26 USCA 6873(a)):

"UNPAID CLAIMS.

(a) General Rule.—Any portion of a claim for taxes allowed in a receivership proceeding or any proceeding under the Bankruptcy Act which is unpaid shall be paid by the taxpayer upon notice and demand from the Secretary or his delegate after the termination of such proceeding."

§57(j)(n) Bankruptcy Act (11 USCA 93 j. n.):

j. "Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued on the amount of such loss according to law."

n. "Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed."

§17(a)(1) Bankruptcy Act (11 USCA 35(a)(1)):

17(a)(1). "Debts Not Affected by a Discharge. a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality;"

APPENDIX B.

Memorandum of Decision.

United States District Court, Southern District of California, Central Division.

Paul F. Bruning, Plaintiff, vs. United States of America, Defendant. No. 561-60 WB.

Filed April 10, 1961.

Plaintiff incurred liability for withholding and Social Security taxes as an employer for the fourth quarter of the year 1951, but failed to pay more than a portion of this liability. On July 6, 1953, he filed a voluntary petition in bankruptcy and was on the same day adjudicated a bankrupt. The District Director of Internal Revenue filed a claim in the bankruptcy proceedings for the delinquent taxes. No dividend was received by the general creditors in the bankruptcy proceedings and the dividend received by the defendant on its priority claim for taxes was only a fraction of the assessed amount. Plaintiff was granted a discharge in bankruptcy on October 29, 1953.

In 1957 plaintiff filed claims for the refund of his income taxes paid for the years 1953 and 1954. These claims were audited and plaintiff was allowed a net operating loss which gave rise to a deduction and thus a credit for income taxes and interest paid for the years 1953 and 1954.

On March 7, 1959, the Director of Internal Revenue applied the entire 1953 credit and a part of the 1954 credit against the balance of the assessment of the withholding and FICA taxes for the fourth quarter of 1951 plus accrued interest and additions to tax computed to that date. Of the amount so applied, a por-

tion was allotted to the interest and additions to taxes accrued to that date. (Defendant concedes errors in the computation of interest, which will give plaintiff an overpayment of $40.40 in any event.) The amount of interest which had accrued during the period between the filing of petition in bankruptcy on July 6, 1953, and the date of credit March 7, 1958, was $759.-40, and is the amount involved in this action.

The plaintiff has satisfied all jurisdictional prerequisites to this suit for refund, having paid the post-petition interest, filed a claim for refund, and the refund having been denied.

The question for determination is whether interest on delinquent taxes claimed in the bankruptcy estate accrues after the filing of a petition in bankruptcy and is collectible from the taxpayer himself, who is discharged in bankruptcy. Both parties agree that such interest does not accrue on the claim *against the estate*. The narrow question presented is whether the interest may be collected from the taxpayer himself, by resorting to after-acquired assets or property except from the bankruptcy proceedings.

Plaintiff relies on the case of *City of New York vs. Saper*, 336 U. S. 320, 69 S. Ct. 554, 93 L. Ed. 710, where the Supreme Court held that tax claims against a *bankruptcy estate* bear interest only until the date of bankruptcy, not until payment. The Court's rationale appears at pages 330-332 of 336 U. S.:

> ". . . More than forty years ago Mr. Justice Holmes wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. He said the rule was not a matter of legislative command or

statutory construction but, rather, a fundamental principle of the English bankruptcy system which we copied. Sexton v. Dreyfus, 219 U. S. 339, 344. Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to the contrary. Section 63(a)(1), 11 U.S.C. §103(a)(1) allows interest on judgments only to date of bankruptcy. Section 63(a)(5), 11 U.S.C. §103(a)(5) allows interest only to that date on debts reduced to judgment after bankruptcy. No provision permits post-bankruptcy interest on other claims in general or tax claims in particular. Section 57(j), 11 U.S.C. §93(j), forbidding allowance of government penalties or forfeitures, permits allowance of losses sustained by the acts penalized, with actual costs and 'such interest as may have accrued thereon according to law'. However, on its face this appears to delimit even such allowable debts as of the date of bankruptcy and to allow no more interest than does §63 with respect to the claims there specified. Moreover, there is no interest except that which accrues according to law—it is exactly such interest that the 'fundamental principle' cuts off as of bankruptcy. Section 57(n), 11 U.S.C. §93(n) requires governmental claims to be proved in the same manner and within the same time as other debts and only for cause shown may a reasonable extension be granted. Tax claims are treated the same as other debts except for the fourth priority of payment, §64(a), 11 U.S.C. §104(a), and the provisions

making taxes nondischargeable, §17, 11 U.S.C. §35. But each of these sections is silent as to interest.

"The long-standing rule against post-bankruptcy interest appears implicit in our current bankruptcy Act. To read into such a statute an exception to that rule would be unwarranted and, as an original proposition, we should decline to do so . . ."

The plaintiff's reliance appears misplaced, as the question here at issue was not considered in the *Saper* case, which involved interest on an unliened tax claim of the City of New York which the City attempted to collect from the *bankruptcy estate*, not from the taxpayer. The instant case concerns the liability of the taxpayer himself for such interest when collected from the taxpayer's assets acquired *after bankruptcy*. The *Saper* principle that tax claims against a bankrupt bear interest only until the date of bankruptcy, not until payment, has been applied by three Circuit Courts including our own, (*U. S. vs. Bass*, 271 F. 2d 129 (CA 9); *U. S. vs. Harrington*, 269 F. 2d 719 (CA 4), *In re Kerber Packing Co.*, 276 P. 2d 245 (CA 7)) and is the settled law, but it is not dispositive of this case.

The Tenth Circuit case of *U. S. vs. Mighell*, 273 F. 2d 682, would seem to support the plaintiff's position, as it affirmed the right of the lower court to enjoin the collection of post-petition interest on lien claims from the debtor himself after his discharge. In citing *U. S. vs. Bass*, supra, and *U. S. vs. Barrington*, supra, the *Mighell* court stated, "This contention of the United States has been rejected and post-bankruptcy interest on liened tax claims denied. As we agree with

those decisions, no good purpose would be gained by going over the same ground that they have covered adequately."

This conclusion rests, I believe, on a wholly unwarranted dependence on *Bass* and *Harrington*. It disregards the only issue that was before the court in each of those cases, and thereby misconceives the holding in each. Both *Bass* and *Harrington* were concerned with the issue of the *obligation of the bankruptcy estate* for post-petition interest on tax claims sought to be *proved and allowed in the estate*. It is true that both courts denied "post-bankruptcy interest on liened tax claims", but it was interest sought to be allowed and *collected from the estate*, not from the taxpayer. These courts both followed the Supreme Court holding in the *Saper* and *Dreyfus* cases that inherent in our bankruptcy law is a fundamental principle, taken from the English system, *viz.* the cutting off of interest *against the estate* at the time of bankruptcy. It does not follow that this interest may not be collected from the taxpayer after his discharge in bankruptcy when the other creditors are unaffected.

It is clear from *Bass* and *Harrington*, as well as *Saper* and *Dreyfus*, that the phrases "everything stops at a certain date", "interest cut off as of bankruptcy", relate to the obligations of the *bankruptcy estate* and not to those of the taxpayer. For example, if the estate turns out to be solvent and there is a surplus after the payment of all creditors' claims, the surplus *is supplied to creditors' claims for interest*, and not returned to the debtor. See also *Beecher vs. Leavenworth State Bank*, 192 F. 2d 10 (CA9) to the same effect. That the purpose of the "cut off" rule is to preserve the estate is

made manifest by the *Beecher* court in stating, "There is just as much danger of *eating up the bankrupt's estate* with interest on claims arising after the date of bankruptcy as with interest on claims arising before the date of bankruptcy. Consequently, the allowance of interest on these supplemental claims must be modified in the same manner as the other secured claims." (emphasis supplied)

The *Saper* case (336 U.S. at page 338) cited *American Iron Co. vs. Seaboard Air Line,* 233 U.S. 251, as stating the correct rule. The latter case held (233 U.S. at pages 266, 267) that the rule stopping interest from accruing against the estate "did not prevent the running of interest" and cited with approval *Johnson vs. Norris,* 190 F. 459, where the court stated at page 463, "It is true, as a general rule, that, where property of an insolvent passes into the hands of the court, subsequently accruing interest is not allowed against the fund. (citing case). This principle is applied *as between creditors claiming the fund.*" (emphasis supplied)

The Internal Revenue Code of 1939 governs the liability for interest on taxes[1] and provides that in case of delinquency there *shall be added as part of the tax,* interest at the rate of six per centum per annum from the date the tax became due until paid. The Code provides that a lien arises with respect to any delinquent tax, that it includes interest and "shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."[2]

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[1] §§ 1623, 1627, 1420(b).
[2] §§ 3670, 3671.

The Bankruptcy Act expressly excepts taxes from discharge[3] and the clear language of the revenue statute *adds interest to the tax*. The result is that interest added to the tax is excepted from discharge. There is nothing in the Bankruptcy Act, the Internal Revenue Code or the "fundamental principle of the English bankruptcy system" which should compel or permit a contrary conclusion.

Dated April 10, 1961.

WM. M. BYRNE,
United States District Judge.

[3] § 17 (11 U.S.C.A. 35).

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Paul F. Bruning, Appellant, vs. United States of America, Appellee. No. 17,445.

May 3, 1963.

Appeal from the United States District Court for the Southern District of California, Central Division. Before: CHAMBERS and BARNES, Circuit Judges.[1]

CHAMBERS, Circuit Judge:

Paul F. Bruning has been through bankruptcy. At adjudication one of his debts was to the United States for withholding and social security taxes for the fourth quarter of the year 1951. The government participated in the bankruptcy estate, but its claim was only partially satisfied on distribution.

Bruning is entitled to an income tax refund for later years unless the government can offset the refund by charging him post bankruptcy interest (that is, after adjudication). The case gets into court because Bruning has filed claims with the director of internal revenue for a refund which were denied.[2] So he sought in the

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[1]John R. Ross, United States district judge for the District of Nevada, was the third member of the division which heard the arguments. His death occurred on April 22, 1963. Therefore, he has not participated in the decision herein.

[2]As of the date of adjudication of bankruptcy on July 6, 1953, the principal balance on the unpaid taxes was about $3,000.00. This was reduced by about $700.00 by a distribution in the estate. Appellant Bruning does not question the director's right to deduct the principal balance from his refund. What is at issue in this case is the right of the director to deduct about $800.00 in post bankruptcy interest.

district court to obtain the money from the United States. This he was denied by the district court. Bruning v. United States, 192 F. Supp. 826. Although it probably sets up a conflict with United States v. Mighell, 10 Cir., 273 F.2d 682, we choose to follow our trial court's decision.

Section 17a. of the Bankruptcy Act (11 U.S.C. §35a.) provides as follows:

"DEBTS NOT AFFECTED BY A DISCHARGE.—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; or (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on

salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of an employee received or retained by his employer, to secure the faithful performance by such employee of the terms of a contract of employment."

Obviously, under the above section insofar as the principal amount of tax debt was not satisfied out of the bankruptcy estate, the taxpayer would remain liable after his discharge.

It is well settled that as between the tax collector and the bankrupt estate that interest is suspended[3] as of the time of adjudication, City of New York v. Saper, 336 U.S. 328; United States v. Bass, 9 Cir., 271 F.2d 719; and In Re Kerber Packing Co., 7 Cir., 276 F.2d 245. But if the estate is adequate and more to pay all claims which had accrued (including interest) as of the date of the bankruptcy then as between the debtor and the creditors, the latter get from the estate post bankruptcy interest. So even in the estate post bankruptcy interest is not gone for all purposes. American Iron Co. v. Seaboard Air Line, 233 U.S. 261; Brown v. Leo, 2 Cir. 34 F.2d 127.[4]

Some of the cases denying relief for the extra interest out of the estate do speak of compassion for the debtor or of what will restore the debtor's economic health. For example, see National Foundry Company of N.Y. v. Director of Internal Revenue, 2 Cir., 229 F.2d 149.

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[3]One exception of course is negotiated security transactions. To the extent the security is adequate, interest is allowed against the res of the security during administration. Palo Alto Mutual Savings and Loan Ass'n v. Williams, 9 Cir., 1957, 247 F.2d 777.

[4]Provable claims in bankruptcy are covered by Section 63 of the Act (11 U.S.C. § 103).

But, if paying interest on one's taxes after discharge is inimical to an ex-bankrupt's health, so is the payment of any balance of principal.

Section 17a. is not a compassionate section for debtors. Congress, speaking for society, has decided that the problems of others: the government, the abandoned-dependent wife, the defrauded widow, overide the value of giving the debtor a wholly new start in life.

There is language in City of New York v. Saper, trustee, supra, which is favorable to appellant here, but we think the holding, based upon the internal arrangements of the bankruptcy estate, does not require us to reverse. Further, we believe our ruling consistent with our bankruptcy estate decision of United States v. Bass, supra.

This opinion need not be further continued to restate in a different way the published opinion of Bruning's case in the trial court cited hereinabove.

Legislation is not our business. It may well be that with taxes reaching a position of dominance in the whole bankruptcy field, when the government gives away so much, it ought to give away after bankruptcy the interest on its taxes. Maybe Congress should say so clearly. But if we did so would we not give away the interest of him who was defrauded, the victim of the willful and brutal injury, those who lost by embezzlement? Perhaps we could waive the interest of the holders of judgment for breaches of promises to marry without too many qualms. But how could we

choose among the beneficiaries of Section 17a? It must be admitted that taxes and more taxes so overshadow by general weight and burden the other protected debts of 17a. and that in most cases to talk of the other non-dischargeable debts is often theory. But the section was written on a day other than today.

Affirmed.

(Endorsed) Opinion Filed May 3, 1963.

Frank H. Schmid, Clerk.

APPENDIX C.

United States Court of Appeals
for the Ninth Circuit

No. 17445

Paul F. Bruning,

Appellant,

vs.

United States of America,

Appellee.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and Entered May 3, 1963.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 423

PAUL F. BRUNING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The issue involved in the present case is whether the United States is entitled to recover post-bankruptcy interest on its tax claims out of property acquired by the bankrupt after discharge from bankruptcy, where the tax claims were not discharged by reason of Section 17 of the Bankruptcy Act.

The taxpayer was adjudicated a bankrupt on July 6, 1953. At that time the United States had assessed unpaid withholding and F.I.C.A. taxes for 1951. The trustee made a partial payment of the principal of

the taxes out of the assets in the bankrupt estate, and the taxpayer was granted a discharge from bankruptcy on October 29, 1953. Subsequently, in 1957, the taxpayer filed claims for a refund of income taxes paid for the years 1953 and 1954, which resulted in his being allowed a credit for income taxes and interest in respect of those years. On March 7, 1958, the Director of Internal Revenue applied the entire 1953 credit and part of the 1954 credit to the balance of the assessment of the withholding and F.I.C.A. taxes owed for 1951 plus interest to date—including the interest which had accrued during the period between the filing of the petition in bankruptcy on July 6, 1953, and the date of credit, March 7, 1958. The amount of this latter interest, $759.40, is the subject of the present controversy. The taxpayer did not question the Director's right to setoff from the amount of refund due him the unpaid principal of the taxes and the pre-bankruptcy interest. However, he brought the present suit for refund of the post-petition interest. (Pet. App. 2-3.)

Section 17(a) of the Bankruptcy Act, c. 541, 30 Stat. 544 (11 U.S.C. 35 (a)), as amended, specifically excepts from discharge in bankruptcy those "provable debts" which "are due as a tax levied by the United States."[1] No provision of the Bank-

[1] Section 17(a), so far as here pertinent, reads as follows:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality * * *.

ruptcy Act provides that the debtor shall be released from liability for future interest on debts which have not themselves been discharged, and we believe there is no basis in reason for such a partial discharge of a debt which the statute excepts from discharge. Moreover, Section 1420 and 1627 [2] of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Secs. 1420 and 1627), which impose interest upon delinquent withholding and F.I.C.A. taxes, provide that such interest "shall be added as part of the tax." Both courts below construed these provisions as entitling the government to collect post-bankruptcy interest on delinquent taxes out of assets which were acquired by the taxpayer subsequent to his discharge in bankruptcy.

As the court below indicated (Pet. App. 10), the decision in the present case conflicts with that of the Tenth Circuit in *United States v. Mighell*, 273 F. 2d 682.[3] We believe that the court below was correct

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[2] Section 1627 was added to the Internal Revenue Code of 1939 by Section 2(a) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, and incorporates by reference Section 1420.

[3] See also, *Sword Line* v. *Industrial Commissioner of State of N.Y.*, 212 F. 2d 865 (C.A. 2), certiorari denied, 348 U.S. 830, and *National Foundry Co. of N. Y.* v. *Director of Int. Rev.*, 229 F. 2d 149 (C.A. 2). The taxpayer is mistaken in asserting a conflict (Pet. 4, 5-6) between the decision below and *New York* v. *Saper*, 336 U.S. 328. In *Saper* this Court held that post-bankruptcy interest is not collectible where the assets from which the interest would have been paid were part of the bankrupt estate. As both courts below point out (Pet. App. 3-7, 12), the present case is different, in that here the government seeks to collect interest only from assets

and the Tenth Circuit was wrong in *Mighell*. There is a direct conflict, however; the question is one of continuing importance in the administration of the revenue and bankruptcy laws; and this case is an appropriate one for its resolution. Consequently, we do not oppose the issuance of a writ of certiorari.

Respectfully submitted,

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OCTOBER, 1963.

---

which never formed a part of the bankrupt estate, but were acquired by the taxpayer after his discharge from bankruptcy. Accordingly, the considerations expressed by this Court in *Saper*, which led it to deny post-bankruptcy interest payable out of the bankrupt estate, are not applicable to the debts involved in the present proceeding.

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IN THE

Supreme Court of the United States

October Term, 1963
No. 423

PAUL F. BRUNING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Court of Appeals [R. 31-34] is reported at 317 F. 2d 229. The opinion of the District Court is reported at 192 Fed. Supp. 826.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 3, 1963 [R. 34-35]. On August 2, 1963, by order of Mr. Justice White, the time within which to file a petition for a writ of certiorari was extended to September 2, 1963 [R. 35]. The petition was filed August 30, 1963, and was granted on November 18, 1963. The jurisdiction of this Court rests on 28 U. S. C. A. 1254(1).

Question Presented.

Whether Petitioner Is Liable to Pay Interest on His Federal Tax Liability Accrued Subsequent to the Date of His Being Adjudicated Bankrupt Out of His Own Assets Acquired Subsequent to the Adjudication of Bankruptcy.

Statutes Involved.

The applicable portions of the pertinent statutes will be found in the Appendix *infra*, pp. A-1 through A-3.

Statement.

Petitioner, doing business in the state of Louisiana as Bruning Construction Company, incurred withholding and federal insurance contributions taxes during the fourth quarter of the year 1951 but failed to pay said taxes when due. In March, 1952, an assessment was made against petitioner. On July 6, 1953, petitioner filed a voluntary petition in bankruptcy and was on that same day adjudicated a bankrupt in the Western District of Louisiana. The District Director of Internal Revenue at New Orleans filed a claim in the bankruptcy proceedings for said assessment. No dividend was received by the general creditors in the bankruptcy proceeding and the dividend on priority claims, including taxes, was prorated. The United States received a small distribution which was applied to said assessment. The petitioner was granted a discharge in bankruptcy in October, 1953, and the case was closed in June, 1954.

Certain adjustments were made with regard to the assessment by virtue of payments and credits. On June 22, 1959, petitioner filed a claim for refund of $955.81 which he claimed was unlawfully accrued as interest between the date of his bankruptcy on July 6, 1953 and March 7, 1958, the day of the final payment of withholding and FICA taxes assessed for the fourth quarter of 1951. The claim for refund was rejected and action timely commenced within a two year period. The amount in dispute was later reduced from $955.81 to $795.40.

The District Court sustained the Commissioner's action in denying petitioner's claim for refund and the Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court [R. 34-35].

Summary of Argument.

It has been held in *City of New York v. Saper* (1949), 336 U. S. 328 that no provision of the Bankruptcy Act permits post-bankruptcy interest on other claims in general or tax claims in particular. *Section 6873(a) of the Internal Revenue Code of 1954* and its counterparts in the Internal Revenue Code of 1939 permits collection of no more than the unpaid portion of an allowed claim for taxes from the taxpayer after the termination of the bankruptcy proceeding.

The allowance of post-bankruptcy interest upon tax claims would greatly complicate the administration of bankruptcy estates. It would also tend to defeat the

object of the Bankruptcy Act which is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Williams v. United States* (1915), 236 U. S. 549, 554, 555; *California State Board of Equalization v. Coast Radio Products* (1955), CA-9, 228 F. 2d 520, 522.

It is submitted that Paul F. Bruning's liability for federal taxes ceased to bear interest on the date that he was adjudicated a bankrupt and post-bankruptcy interest upon the claim allowed for said taxes in the bankruptcy proceedings may not be collected from the taxpayer's subsequently acquired property.

ARGUMENT.

The Accrual of Interest Upon Paul F. Bruning's Federal Tax Liability Ceased as of the Date He Was Adjudicated a Bankrupt and Could Not Properly Be Collected From His Subsequently Acquired Assets.

In the case of *City of New York v. Saper* (1949), 336 U. S. 328, affirming (C. A. 2), 168 F. 2d 268 the first sentence of the opinion delivered by Mr. Justice Jackson stated the issue as follows: "The ultimate issue in these three cases is whether tax claims against a bankrupt bear interest until the date of bankruptcy as held by the court below, or until payment as previously held by another Court of Appeals." In the petitioner's view of the present proceeding the ultimate issue is the same here as in the *Saper* case, *supra*. The Supreme Court upheld the decision of the Court of Appeals for the Second Circuit that interest on tax claims accrued only to the date of bankruptcy. In so doing the Supreme Court reasoned in the course of its opinion as follows:

> "If the question were one of first impression to be decided in the light of the present statute alone, we should have no difficulty in affirming the court below. More than forty years ago, Mr. Justice Holmes wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. He said the rule was not a matter of legislative command or statutory construction but, rather, a fundamental principle of the English bankruptcy system which we copied. *Sexton v. Dreyfus*, 219 U.S. 339, 344, 31 S. Ct. 256, 257, 55 L. Ed. 244. Our present statute contains no provision expressly repudiat-

ing that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to the contrary. Section 63, sub.a(1), allows interest on judgments and written instruments only to date of bankrupty. Section 63, sub. a(5), 11 USC Section 103, sub. a(5), 11 USCA, Section 103, sub. a(5), allows interest only to that date on debts reduced to judgment after bankruptcy. No provision permits post-bankruptcy interest on other claims in general or tax claims in particular. Section 57, sub. j, 11 USC Section 93, sub. j, 11 USCA Section 93, sub. j, forbidding allowance of governmental penalties or forfeitures permits allowance of losses sustained by the acts penalized, with actual costs and 'such interest as may have accrued thereon according to law.' However, on its face this appears to delimit even such allowable debts as of the date of bankruptcy and to allow no more interest than does Section 63 with respect to the claims there specified. *Moreover, there is no interest except that which accrues according to law—it is exactly such interest that the 'fundamental principle' cuts off as of bankruptcy.* Section 57, sub. n, 11 USC Section 93, sub. n, 11 USCA Section 93, sub. n, requires governmental claims to be proved in the same manner and within the same time as other debts and only for cause shown may a reasonable extension be granted. Tax claims are treated the same as other debts except for the fourth priority of payment, Section 64, sub. a, 11 USC Section 104, sub. a, 11 USCA Section 104, sub. a, and the provision making taxes nondischargeable, Section 17, 11 USC Section 35, 11 USCA Section 35. But each of these sections is silent as to interest."

In footnote 7 of the *Saper* opinion reference is made to 2 Blackstone Commentaries 488 as the source from which the rule against post-bankruptcy interest was derived. Two exceptions to the rule were recognized in the English bankruptcy laws. If the alleged bankrupt proved solvent his creditors received post-bankruptcy interest before any surplus reverted to the debtor; and if securities held by a creditor as collateral produced interest or dividends during bankruptcy such amounts applied to post-bankruptcy interest. Neither exception provided that assets acquired by the debtor subsequent to bankruptcy were liable for the payment of post-bankruptcy interest upon any claims that had been allowed in the bankruptcy proceeding.

Volume I, Section IX, pages 222, 223 and 224 "The Bankrupt Laws" by William Cook of Lincolns Inn published 1788 in London, England, referred to by Justice Holmes in his opinion in the case of *Sexton v. Dreyfus,* 219 U. S. 339 which was in turn cited in the *Saper* case 336 U. S. 328 contains the following comments on the topic of interest:

Ex Parte Bennet 2 Atk. 528

Bromley v. Goodere 1 Atk. 79

"Commissioner, after a man becomes a bankrupt, compute interest upon his debts no lower than the date of the commission because it is a dead fund, and in such a shipwreck, if there is a salvage of a part to each person it is as much as can be expected. But there is no direction in the act for that purpose, and it has been used only as the best method of settling the proportion among the creditors, that they may have

Ex Parte Rooke 1 Atk. 244

a rate-like satisfaction; nor does the certificate operate as a discharge of the fund before vested in the assignees, thereby to deprive the creditors of subsequent interest, but extends only to any remedy to be taken against the person of the bankrupt or his future effects."

"If a mortgage is not adequate to the payment of principal and interest, the mortgagee must apply by petition to have the security sold, and to be admitted a creditor for the deficiency, but the interest of the mortgage is only to be calculated to the date of the commission."

Ex Parte Wardell 29th March 1787

"Therefore upon a petition stating, that previous to the month of December, 1778, John Dyer was indebted to Wardell, in the principal sums of 500£ and 200£ and to secure the repayment thereof, with lawful interest for the same, he mortgaged to him certain copyhold estates. That on the 25th day of April, 1776, Dyer became a bankrupt, and at the time of issuing the Commission was indebted to Wardell, in said two sums 500£ and 200£ with an arrear of interest due thereon. That the mortgage was an insufficient security for the principal and interest, and therefor the petition prayed that the commissioners might proceed to a sale of the mortgaged premises, and that the money arising by the sale, might be applied to the payment of the mortgage money and interest due and to grow due on the mortgage together with costs, and that petitioner might be at lib-

erty to prove the remainder of his debt under the commission, and receive a dividend with the other creditors. The assignees were served but did not appear. It was contended for the mortgagee, that he was entitled to interest to the time of sale, but the Lord Chancellor referred it to the Commissioner, to take an account of the principal and interest due to the petitioner and to tax his costs, and directed that the Commissioner in taking such account, should distinguish between interest incurred after the bankruptcy; and then the estate should be sold, and the monies to arise from the sale should be applied in payment of what should be found to be due the petitioner for principal, interest and costs, and in case the same should be insufficient for the payment of the principal and of the interest to the time of bankruptcy and also of the costs, petitioner should be admitted a creditor under the commission, for the deficiency of what should be found due to him for principal and interest to the time of bankruptcy only, and for his costs, and be paid a dividend, etc."

7 Vin. Abr. 110

"But if the estate mortgaged is sufficient to answer the principal and interest, the assignees cannot redeem without paying interest to the time of redemption."

Section 6873(a) Internal Revenue Code of 1954 (26 U. S. C. A. 6873(a)) contains provisions that are entirely harmonious with the holding of the Supreme Court in the *Saper* case, 336 U. S. 328. Congress stated in that section

"Any portion of a claim for taxes allowed in a receivership proceeding or in any proceeding under the Bankruptcy Act which is unpaid shall be paid by the taxpayer upon notice and demand from the Secretary or his delegate after the termination of such proceeding."

The House Ways and Means Committee Report on Section 6873 of the Internal Revenue Code of 1954, House Report 1337, Page A 422 and the Senate Finance Committee, Report No. 1622, Page 598, both state in their material part:

"This section, which corresponds to sections 274 and 1015 of existing law, relating to the income and gift taxes, requires any unpaid portion of a claim for any tax allowed in the receivership or Bankruptcy Act proceeding to be paid upon notice and demand. * * *"

The cases of *California Board of Equalization v. Coast Radio Products* (1955), CA-9, 228 F. 2d 520 and *Newberg v. United States* (1961), CA-2, 296 F. 2d 153, affirming 187 F. Supp. 158 do not derogate from the statutory rule that only the unpaid portion of a claim allowed in a bankruptcy proceeding shall be paid by the taxpayer. Both cases arose in situations where no claim was presented in the bankruptcy proceeding for the tax liability whose recovery was sought from the after-acquired assets of the taxpayers. The Ninth Circuit pointed out in the case of *California State Board of Equalization v. Coast Radio Products, supra*, that a taxing agency could pursue alternative courses. The Court said:

"It could either file its claim in the bankrupt estate to secure payment from the proceeds thereof,

> or it could rely upon the non-dischargeable nature of the debt, ignore the proceeding and bring an action to collect from appellee's after-acquired property." 228 F. 2d 522, 525.

In the present case the Government chose the first alternative. It complied with the provisions of *Sections 63(a) (1) (5)* and 57(j) and (n) of the Bankruptcy Act. (11 U. S. C. A. 63(a) (1) (5) and 57(j) and (n)). It filed a claim for its taxes in Paul F. Bruning's bankruptcy proceeding on January 11, 1954 [R. 26] and received a dividend of $701.32 on July 10, 1956 [R. 26]. Petitioner has paid the balance of the tax and interest thereon to the date of bankruptcy without question.

However, post-bankruptcy interest on the allowed claim was collected in the amount of $795.40 from the petitioner on March 7, 1958, by the credit of an overpayment of his income taxes and interest for the calendar years 1953 and 1954 [R. 26-27]. The sum of $795.40 in post-bankruptcy interest was not an unpaid portion of a claim allowed in bankruptcy. Interest on that claim could only be allowed to the date of adjudication. *City of New York v. Saper* (1949), 69 S. Ct. 554, 336 U. S. 328, affirming CA-2, 168 F. 2d 268 which had affirmed 75 Fed. Supp. 458; *Bass, Trustee in Bankruptcy v. U. S.* (1959), CA-9, 271 F. 2d 129; *In Re Kerber Packing Co.* (1960), CA-7, 276 F. 2d 245; *National Foundry of New York v. Director of Internal Revenue* (1956), CA-2, 229 F. 2d 149; *Sword Line v. Industrial Commissioner of New York* (1954), CA-2, 212 F. 2d 865; *United States v. Harrington* (1959), CA-4, 269 F. 2d 719; *United States v. Mighell* (1959),

CA-10, 273 F. 2d 682; *United States v. Goggin* (1951), CA-9, 187 F. 2d 530.

It is submitted that the Government cannot pursue both alternatives here at the same time. Having first submitted a claim in the bankrupt estate it must be satisfied with collection of the unpaid balance of the allowed claim, exclusive of post-bankruptcy interest, from Bruning after the termination of the bankruptcy proceeding.

Section 6873(a) of the Internal Revenue Code of 1954 was in effect when post-bankruptcy interest was collected from Bruning on a tax claim that had been allowed in the bankruptcy proceeding. The terms of that section of the Internal Revenue Code are clear and the reports of the Committees of Congress likewise indicate a clear congressional intent that only the part of the tax claim allowed in the bankruptcy proceeding, exclusive of post-bankruptcy interest, could be collected from the taxpayer after the termination of that proceeding. This was the conclusion reached by the Court of Appeals for the Tenth Circuit in the case of *United States v. Mighell* (1959), CA-10, 273 F. 2d 682.

In the *Mighell* case, *supra*, the Court had before it the issue of an injunction issued by the District Court against the Director of Internal Revenue to prevent him from collecting post-bankruptcy interest and penalties from a bankrupt subsequent to his discharge. It upheld the taxpayer as against post-bankruptcy interest on the authority of the cases of *City of New York v. Saper*, 336 U. S. 328; *United States v. Harrington* (CA-4), 269 F. 2d 719 and *United States v. Bass* (CA-9), 271 F. 2d 129. The Tenth Circuit discussed the reasoning underlying its decision in the case of *United*

States v. Mighell, 273 F. 2d 682, 684 in the following terms:

> "The United States contends that the district court abused its discretion in enjoining the Director from asserting against the bankrupts any claims for interest and penalties other than those expressly allowed. The argument is that the bankruptcy court determines the right to discharge but, except in unusual circumstances nonexistent here, does not determine the effect of discharge.
>
> In *Local Loan Co. v. Hunt*, 292 U. S. 234, the Supreme Court held that a bankruptcy court has the power to protect its orders by ancillary proceedings and, in unusual circumstances, may enjoin a threatening creditor from proceeding against assets earned by the bankrupt after discharge where the debt was provable and dischargeable in the bankruptcy proceedings. This circuit followed the *Hunt* decision in *Personal Industrial Loan Corporation v. Forgay*, 10 Cir., 240 F. 2d 18, 19, saying that the power to enjoin "is not an absolute power and may be exercised only under such conditions as appeal to the equitable conscience of the court."
>
> "Abuse of discretion is claimed on the ground that the bankruptcy court has anticipated an action for collection and an erroneous interpretation of the discharge order. The difficulty is that the claim of the United States is based upon a statutory lien which requires no judgment to make it effective. The need for injunctive relief is more apparent here than it was in the *Forgay* case where state court action was necessary to collect the debt and the discharge could have been pleaded in bar.

"The remedy in bankruptcy proceedings of an injunction against the District Director of Internal Revenue was expressly ordered in *National Foundry Co. of N. Y. v. Director of Internal Revenue,* CA-2 229 F. 2d 149 (48 AFTR 853), in circumstances which differ from those under consideration here only in the fact that there a corporation was involved and here we are concerned with individuals. In the *National Foundry* case it was said that proceedings to collect were "at best futile, at worst inimical to the future welfare of the newly reorganized corporation." That statement applies here. There is no significant distinction between a reorganized corporation struggling to regain financial health and an individual seeking relief from overburdensome debts. The issuance of the injunctive order in the circumstances of this case was not an abuse of discretion."

The case of *Bass, Trustee in Bankruptcy v. U. S.* (1959), CA-9, 271 F. 2d 129, was known as *In re Cameron No. 69054-Y* in the District Court for the Southern District of California. 2 AFTR 2d 5826. The District Court's Opinion was written by Chief Judge Yankwich. In the course of that opinion Judge Yankwich said:

"Interest on Claims in Bankruptcy

The determination of the matter calls for a brief examination of the problem of interest on claims in bankruptcy. Section 63(a) of the Bankruptcy Act of 1938, which, in one form or another, has existed since the enactment of the first Bankruptcy Act, provides:

'Debts of the bankrupt may be proved upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;'

"One of the great innovations of the 1938 Act was to put claims of the United States and the States in the same class with others so far as proving and filing are concerned, with the exception that the Government or a State or subdivision may obtain an extension of time. The object of the section, as interpreted by writers, so far as interest is concerned, has been summed up in this manner:

'A governmental or public claim can include interest in like manner and to the same extent as any other claim, but to no greater extent. It cannot include interest accruing after the filing of the bankruptcy or reorganization petition, even though it has been reduced to lien form."[2]

"The Congress, in placing federal and state taxing bodies and other creditors on the same footing as to interest, gave effect to traditional doctrine which, for over a century and a half, in England

[2] 2 Remington Bankruptcy, 1956, pp. 224-225.

and in the United States, disallowed interest in bankruptcy. The reason was stated by Mr. Justice Holmes in a leading case:

> 'For more than a century and a half the theory of the English bankrupt system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission. * * * The rule is not unreasonable when closely considered. It simply fixes the moment when the affairs of the bankrupt are supposed to be wound up."[10]

There has been no break in the continuity of this approach.[11] Significantly, in the last case, the Court says as to Government tax claims:

> 'Tax claims are treated the same as other debts except for the fourth priority of payment, Section 54(a), 11 U.S.C. Section 104(a), and the provision making taxes nondischargeable, Section 17, 11 U.S.C. Section 35. But each of these sections is silent as to interest.'
>
> 'The long-standing rule against post-bankruptcy interest thus appears implicit in our current Bankruptcy Act.'

"In the case in which this statement was made, the Court held that the City of New York could not claim interest on taxes beyond the date of bankruptcy. As the Bankruptcy Act of 1938 makes no distinction between state and federal taxes

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[10]Sexton v. Dreyfus, 1911, 219 U. S. 339, 344.

[11]*American Iron Company v. Seaboard Airliner*, 1913, 233 U. S. 261, 366-367; *Vanston Committee v. Green*, 1946, 329 U. S. 156, 163-165. *In re Inland Gas Corp.*, 6 Cir., 1957, 241 F. 2d 374.

grouping them as claims, the Courts of Appeals which have had occasion to apply this decision, have held that tax claims by the Government of the United States are in the same category and draw no interest beyond the date of bankruptcy.

"The Supreme Court, in denying certiorari in two of these cases, specifically referred to its ruling in the *Saper* case. It is noteworthy also that in each of these cases, the Government urged (*as it does in this case*), that the Saper case ruling be confined to the specific situation in that case. However, the Courts declined to do so and held that, by analogy, the principle applied not only to bankruptcy, but to receiverships and reorganization proceedings. The Court of Appeals for the Second Circuit in the case just cited, speaking through Chief Judge Clark, said very emphatically:

'The question of the accruing of interest and tax penalites during bankruptcy had divided the courts, including different panels of our own court, until the case of City of New York v. Saper, 336 U.S. 328 (38 AFTR 491), 69 S. Ct. 554, 93 L.Ed. 710, and other companion cases settled that such claims, whether federal or state, were not collectible in bankruptcy including reorganization and arrangement proceedings. Thereafter we construed the meaning and intent of this principle to be that such claims could not thereafter be used to harass a reorganized corporation as it attempted anew to face the vicissitudes of business life. It is true that Sword Line v. Industrial Commissioner of State of New York, 2 Cir., 212 F. 2d 865, certiorari de-

> nied 348 U.S. 830, 75 S. Ct. 53, 99 L.Ed. 654, specifically concerned a state claim; but the entire reasoning, based upon the Saper principle, was as completely applicable to federal as to state claims. See 30 N.Y.U.L.Rev. 716, n. 2, 718, n. 17. In our view interest and penalties did not accrue after the bankruptcy. Whether this or a rationale that they accrued but were barred, see 54 Col. L. Rev. 1293; 30 N.Y.U.L. Rev. 558, 580-584, is the more appropriate, the result is the same. They are nonexistent; and the proceedings for their collection are at best futile, at worst inimical to the future welfare of the newly reorganized corporation. In the Sword Line case there was an extensive and persuasive dissent advancing all the arguments which it seems the appellee here can eventually propound; but the denial of certiorari, 348 U.S. 830, 75 S. Ct. 53, 99 L.Ed. 654, terminated that claim and permitted our injunction against the state proceedings for collection to stand.'"

It appears probable that the future welfare of the bankrupt was historically, as now, an important element for consideration when the English Bankruptcy laws were taking form. It is well known that at that time imprisonment for debt was common. If post-bankruptcy interest were allowed many an imprisoned debtor would never get out of jail much less regain what Judge Chamber's, in the opinion here on review, calls the "debtor's economic health." 317 F. 2d 229, 231.

It is Bruning's contention that *Section 17(a) of the Bankruptcy Act* and *Section 6873(a) of the Internal Revenue Code of 1954* confine the impairment of a

bankrupt's economic health by a claim for Federal taxes to the unpaid balance of the allowed portion of that claim, without allowance for any interest upon the liability itself subsequent to bankruptcy. The Government is limited to taking the entire bankrupt estate, if necessary, plus an amount of the bankrupt's after-acquired property to pay the unsatisfied portion of the allowed tax claim.

Conclusion.

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

Dated: January 7, 1964.

ERNEST R. MORTENSON,
Counsel for Petitioner.

APPENDIX

Statutes Involved.

Section 17(a)(1) Bankruptcy Act (11 USCA 35 (a)(1)):

17(a)(1). "Debts not affected by a discharge

(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; or (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of an employee received or re-

tained by his employer to secure the faithful performance by such employee of the terms of a contract of employment. July 1, 1898, c. 541, § 17, 30 Stat. 550; Feb. 5, 1903, c. 487, § 5, 32 Stat. 798; Mar. 2, 1917, c. 153, 39 Stat. 999; Jan. 7, 1922, c. 22, 42 Stat. 354; June 22, 1938, c. 575, § 1, 52 Stat. 851.

Section 57(j)(n) Bankruptcy Act (11 USCA 93 (j) and (n)):

(j) "Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

(n) "Except as otherwise provided in this title, all claims provable under this title, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed; . . . ."

Section 63(a)(1)(5) Bankruptcy Act (11 USCA 103):

"Debts which may be proved

(a) Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at

the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; . . . . (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments;"

Sections 6873(a) Internal Revenue Code of 1954 (26 USCA 6873(a)):

"UNPAID CLAIMS.

(a) General Rule.—Any portion of a claim for taxes allowed in a receivership proceeding or any proceeding under the Bankruptcy Act which is unpaid shall be paid by the taxpayer upon notice and demand from the Secretary or his delegate after the termination of such proceeding."

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 423

PAUL F. BRUNING, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court's memorandum of decision (R. 18–23) is reported at 192 F. Supp. 826. The opinion of the court of appeals (R. 31–34) is reported at 317 F. 2d 229.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1963 (R. 34–35). On August 2, 1963, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including September 2, 1963 (R. 35). The petition was filed on August 30, 1963, and was granted on November 18, 1963 (R. 36; 375 U.S. 920). The jurisdiction of this

Court rests on Section 24c of the Bankruptcy Act, as amended, and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether interest continues to run against the debtor personally on a tax debt preserved against discharge in bankruptcy by Section 17 of the Bankruptcy Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Bankruptcy Act and of the Internal Revenue Code of 1939 are set forth in Appendix A, *infra*, pp. 26–29.

STATEMENT

The taxpayer incurred a liability of over $4,000 for withholding and Social Security (F.I.C.A.) taxes for the fourth quarter of 1951. These taxes were not paid when due, and on March 3, 1952, an assessment thereof was made by the Internal Revenue Service. On July 6, 1953, when a substantial portion of these taxes remained unpaid, the taxpayer filed a voluntary petition in bankruptcy. The District Director of Internal Revenue filed a claim in bankruptcy for the balance of the assessed amount owed by the taxpayer. No dividend was paid in the bankruptcy proceedings to the general creditors, and payment of a dividend on priority claims, including taxes, was prorated. On July 10, 1956, the United States received from the bankruptcy estate a distribution of $701.32, which was applied against the assessment. On October 29, 1953, the taxpayer was granted a dis-

charge in bankruptcy, and the bankruptcy case was closed on June 29, 1954. (R. 25–26.)

In 1957 the taxpayer filed claims for refund of income taxes paid for the years 1953 and 1954. Upon audit of these claims the taxpayer was allowed a credit of $857.55 as to income taxes and interest paid for 1953 and $3,382.62 as to income taxes and interest paid for 1954. The Director of Internal Revenue reduced these credits by the amount of the balance of the assessment due for withholding and F.I.C.A. taxes for the fourth quarter of 1951 plus accrued interest to the date of payment, and distributed the remainder to the taxpayer. Contending that he was not liable for interest accruing on the assessment after the petition in bankruptcy was filed, the taxpayer brought a suit in the district court for refund of that portion of the interest which had accrued after such filing. (R. 26–27.)

The district court held that the taxpayer's personal liability for interest on unpaid taxes was not discharged by the Bankruptcy Act (R. 18–23, 28–29). The court of appeals affirmed. (R. 31–34.)

SUMMARY OF ARGUMENT

1. While a creditor of a bankrupt debtor has only such rights against the bankruptcy estate as are granted by the Bankruptcy Act and common law, he retains all of his rights to continue to proceed against the debtor personally unless the Act discharges the debt on which his action is based. There is no common-law rule of bankruptcy discharging a debtor from personal liability on any of his unpaid debts.

The traditional rule for liquidation of the bankruptcy estate has been that a creditor will be allowed only interest to the date of the petition in bankruptcy (*Sexton* v. *Dreyfus*, 219 U.S. 339), and this rule is applicable to tax claims (*New York* v. *Saper*, 336 U.S. 328). But the reasons of administrative convenience and fairness among competing creditors which explain this rule for distribution of a bankruptcy estate have no application to claims against the debtor personally, and the rule has not been applied to protect the debtor at the expense of creditors.

2. Under the Bankruptcy Act a discharge releases a debtor from liability for (1) provable debts that are (2) not specifically excepted from discharge by Section 17. A tax is one of the six classes of debts excepted from discharge and is therefore unaffected by the bankruptcy proceedings. The great majority of State and federal courts have assumed that interest continues to run on such debts until they are paid. This is, moreover, the necessary result under the statute. Interest accruing subsequent to the termination of the bankruptcy proceeding is not provable (and therefore not discharged) because it has not yet become a debt and is, in any event, wholly indeterminate in amount. Interest accruing during the bankruptcy proceeding is not provable under the holding of this Court in *New York* v. *Saper*, *supra*. Finally, even if some post-petition interest were provable, it would be as an integral part of the tax debt which is excepted from discharge by Section 17.

3. The Internal Revenue Code regularly defines interest as "part of the tax." Similar provisions have

been included in our tax laws for over thirty-five years and provisions for collecting interest in the same manner as the tax have been present since long before 1898 when the present Bankruptcy Act was first passed. These provisions express a congressional determination that the time of payment and, accordingly, the right to interest are as essential parts of the plan of revenue collection as the tax itself. Congress presumably has acted with this determination in mind in passing and repeatedly amending Section 17 of the Bankruptcy Act, which has always excepted from discharge the entire tax liability due the United States.

ARGUMENT

INTRODUCTION

The two basic functions of the Bankruptcy Act are (1) to provide a fair and orderly procedure under which creditors can attempt to realize on their claims against a bankrupt's property and (2) to provide a discharge for the bankrupt from further liability on many of these claims. The Act accomplishes these functions by provisions for mustering the assets of a bankrupt into a bankruptcy estate in the hands of a trustee; limiting the debts "provable" against the assets; providing for a judicial determination of which provable debts shall be allowed; providing for a fair distribution of the estate among creditors whose debts are allowed; and discharging the bankrupt from liability with regard to most of the provable debts.

Creditors of a bankrupt debtor have either one or both of two rights: (1) a right to proceed against

the trustee and bankruptcy estate on "provable" debts; and (2) a right to continue to proceed against the debtor on debts which are not discharged by the Bankruptcy Act. The scope of a creditor's rights depends upon whether his claim is a "provable" debt as defined in section 63 of the Act (11 U.S.C. 103) and whether such debt is covered by the discharge provision in section 17 of the Act (11 U.S.C. 35), which releases the bankrupt from liability only as to provable debts and even then with certain exceptions. The interaction of these sections gives the following results. Most debts that are provable against the trustee are discharged by section 17. A creditor holding such a claim can proceed only against the bankruptcy estate. Debts which are not provable against the trustee are not discharged by section 17. A creditor holding such a claim can proceed only against the debtor. Several classes of debts listed in section 17, however, may be proved against the trustee but are *not* discharged against the debtor. A creditor holding a claim in one of the specified classes may proceed against either the trustee or the debtor or both, but whatever he recovers from the bankruptcy estate is applied against the undischarged debt owed him by the bankrupt.

This case concerns interest on a tax debt, which is a claim provable against the trustee but excepted from discharge by section 17. As to claims against the trustee, the general rule for liquidation of the bankruptcy estate has long been that a creditor will only be allowed interest to the date of the petition in bankruptcy. *Sexton* v. *Dreyfus*, 219 U.S. 339. In *New*

York v. *Saper*, 336 U.S. 328, the Court held that this rule was applicable to claims against the trustee for taxes as well as to other debts. But the debt for taxes survives bankruptcy to the extent that it is not paid out of the estate. The question in this case, therefore, is whether, as a matter of the personal liability of the debtor, interest continues to run on a debt that is not discharged by the Bankruptcy Act. We submit that it plainly does because: (1) claims against a debtor personally are unaffected by bankruptcy proceedings unless they are discharged by section 17 of the Act; and (2) section 17 does not release the debtor from liability for post-bankruptcy interest on a debt which is not discharged by that section.

I

A DEBTOR IS NOT RELEASED FROM PERSONAL LIABILITY FOR A DEBT UNLESS THE DEBT IS DISCHARGED BY SECTION 17 OF THE BANKRUPTCY ACT

There is no common-law rule of bankruptcy discharging a debtor from personal liability on any of his unpaid debts. A debtor is released from personal liability only as to debts discharged by the Bankruptcy Act and only section 17 of the Act grants such a discharge. The petitioner asserts that the traditional rule of liquidation practice which denies post-petition interest as a claim against the bankruptcy estate also applies to discharge the debtor from personal liability for such interest even if the underlying debt is not discharged by section 17. We submit that this traditional rule plainly has no application to claims against the debtor personally. This is estab-

lished both by the fact that the reasons for the rule are wholly unrelated to actions against the debtor and by the fact that the rule has never been applied to deny creditors post-petition interest for the benefit of the bankrupt debtor.

The reasons for the rule limiting post-petition interest against the bankruptcy estate were early stated by this Court in *American Iron and Steel Manufacturing Co.* v. *Seaboard Air Line Railway*, 233 U.S. 261, 266–267:

> And it is true, as held in *Tredegar Co.* v. *Seaboard Ry.*, 183 Fed. Rep. 289, 290, that as a general rule, after property of an insolvent is in *custodia legis* interest thereafter accruing is not allowed on debts payable out of the fund realized by a sale of the property. But that is not because the claims had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full. If all claims were of equal dignity and all bore the same rate of interest, from the date of the receivership to the date of final distribution, it would be immaterial whether the dividend was calculated on the basis of the principal alone or of principal and interest combined. But some of the debts might carry a high rate and some a low rate, and hence inequality would result in the payment of interest which accrued during the delay incident to collecting and distributing the funds. As this delay was the act of the law, no one should thereby gain an advantage or suffer a loss.

> For that and like reasons, in case funds are not sufficient to pay claims of equal dignity, the distribution is made only on the basis of the principal of the debt. But that rule did not prevent the running of interest during the Receivership; and if as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal shoud be paid. * * *

These reasons were restated in *Vanston Committee* v. *Green,* 329 U.S. 156, 164: "Accrual of simple interest on unsecured claims in bankruptcy was prohibited in order that the administrative inconvenience of continuous recomputation of interest causing recomputation of claims could be avoided. Moreover, different creditors whose claims bore diverse interest rates or were paid by the bankruptcy court on different dates would suffer neither gain nor loss caused solely by delay." The commentators have agreed that these are the sole purposes of the rule. See 3 Collier on *Bankruptcy* (14th ed. 1962), ¶ 63.16; MacLachlan, *Bankruptcy,* Sec. 147.

The reasons for the rule denying post-petition interest on a claim against the trustee and the bankruptcy estate are wholly inapplicable to actions brought against the debtor personally. Where an action is brought against the debtor rather than the estate, the collection of post-petition interest cannot inconvenience the administration of the bankruptcy estate; it cannot delay payment unduly; it cannot diminish the estate in favor of high-interest creditors at the expense of other creditors. The traditional

bankruptcy rule limiting post-petition interest against the estate, therefore, only applies to claims for such interest brought against the trustee and the bankruptcy estate. In short, the rule is one "of liquidation practice rather than * * * a rule of substantive law." 3 Collier on *Bankruptcy* (14th ed. 1962), ¶ 63.16, p. 1858.

That the rule does not supplement the statutory discharge provisions to release the debtor from all post-bankruptcy interest is demonstrated by one of its most important exceptions. For purposes of determining the rights of the creditors against the debtor interest continues to run until the debt is paid or retroactively discharged. *Id.*, at p. 1859. Thus, even as to assets which are part of the bankruptcy estate, if the estate is sufficient to pay all debts plus pre-petition interest, the excess is applied to pay the creditors post-petition interest; it is not returned to the bankrupt.[1]

In *New York* v. *Saper,* 336 U.S. 328, this Court held that the traditional rule denying post-bankruptcy interest against the trustee was applicable to tax

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[1] See *American Iron and Steel Manufacturing Co.* v. *Seaboard Air Line Railway*, 233 U.S. 261, 266–267:

"* * * But that rule did not prevent the running of interest during the Receivership; and if as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid. * * *"

See also, MacLachlan, *Bankruptcy*, Sec. 147, p. 141: "As between the bankrupt and his creditors, however, the bankrupt should pay [interest] according to his contracts if he is able."

claims as well as to other debts. The Court plainly did not extend the rule to claims against the debtor. It held only that claims for taxes were not to be allowed post-bankruptcy interest against the bankruptcy estate when other provable debts were denied such interest. Thus, as the courts below held, after *Saper,* as before, post-petition interest on a debt remains a liability of the debtor personally unless it is discharged by section 17 of the Act.[2]

[2] The Tenth Circuit reached a contrary result, without any explanation, in *United States* v. *Mighell*, 273 F. 2d 682. The court apparently believed, erroneously, that the government had conceded this point and was relying only on the effect of its lien. Although we believe that the decisions of the Second Circuit in *Sword Line* v. *Industrial Commissioner of State of N.Y.*, 212 F. 2d 865 (C.A. 2d), certiorari denied, 348 U.S. 830, and *National Foundry Co. of N.Y.* v. *Director of Int. Rev.*, 229 F. 2d 149 (C.A. 2), involve a plain misconstruction of *Saper* and are erroneous largely for the reasons spelled out by Judge Frank dissenting in the *Sword Line* case, these decisions are also distinguishable from the present case because they both involved arrangement proceedings under Chapter XI of the Bankruptcy Act. As we have pointed out, the rule of liquidation practice forbidding post-petition interest is for the protection of pre-petition creditors, not of the bankrupt. After an arrangement—but not after an ordinary bankruptcy proceeding—pre-petition creditors continue to have an interest in the assets owned by the debtor at the time of petition and retained by the debtor pursuant to the arrangement. Thus, if post-petition interest on a tax is collected out of these retained assets, the burden may fall on the other pre-petition creditors. In contrast, they cannot be affected by an action against the undischarged debtor after an ordinary bankruptcy proceeding such as that in this case.

II

THE BANKRUPTCY ACT DOES NOT RELEASE A DEBTOR FROM PERSONAL LIABILITY FOR CONTINUING INTEREST ON A DEBT WHICH IS ITSELF EXCEPTED FROM DISCHARGE BY SECTION 17

Section 17 of the Bankruptcy Act[3] states explicitly that certain classes of debts, one of which is taxes, are not to be discharged. The debtor is to remain personally liable for these debts. As a matter of common understanding, one would assume that Congress intended neither the principal nor the interest on such a continuing debt to be affected by the bankruptcy proceeding. Thus, it has never been suggested that a creditor whose claim is not provable against the trustee in bankruptcy loses his right to interest in an action brought against the debtor personally. And where a discharge is denied the bankrupt, all creditors can collect continuing interest from the debtor personally for they then remain "free to pursue the collection * * * of their claims in the ordinary manner * * * as though no bankruptcy proceedings had ever been filed * * *." *In re Cameron,* decision of referee adopted by Judge Yankwich, 61-1, U.S.T.C. ¶ 9318 (S.D. Cal.). Congress presumably intended the same result in the case of a debt that is provable against the

[3] Section 17 (11 U.S.C. 35) provides:

"*Debts Not Affected by a Discharge.*—(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; * * *."

estate but not discharged against the debtor.[4] Because interest is both the cost of the use of amounts owing to a creditor and an important incentive to prompt repayment of a debt, it is, in almost every context, treated as an integral part of a continuing debt.

It is, perhaps, for this reason that, of the ninety cases we have been able to find dealing with post-petition interest on the classes of debts, other than taxes,[5] which are excepted from discharge under section 17, all but one has granted post-petition interest. These cases are set out in Appendix B, pp. 30–36. Although the interest was allowed in almost every instance without discussion, the near unanimity of approach demonstrates the common understanding in the courts throughout the country that the Bankruptcy Act was not intended to maintain in existence

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[4] A creditor with a provable claim that is not discharged in bankruptcy has no obligation to claim against the bankruptcy estate at all. He can simply continue to rely on his undischarged rights against the debtor personally. See *California State Board of Equal.* v. *Coast Radio Prod.*, 228 F. 2d 520 (C.A. 9th); *Salsbury Motors* v. *United States*, 210 F. 2d 171 (C.A. 9th), certiorari denied, 347 U.S. 953, and *Newburg* v. *United States*, 296 F. 2d 152 (C.A. 2d), affirming *per curiam* 187 F. Supp. 158 (S.D. N.Y.).

[5] There is, of course, no basis for distinction in the case of tax claims. The court below observed that if it ruled that after bankruptcy the interest on taxes is not collectible (R. 34)—

"* * * would we not give away the interest of him who was defrauded, the victim of the willful and brutal injury, those who lost by embezzlement? Perhaps we could waive the interest of the holders of judgment for breaches of promises to marry without too many qualms. But how could we choose among the beneficiaries of Section 17a?"

a creditor's claim against the debtor personally and yet cut off the interest which is merely a normal incident of any debt. This is, indeed, no more than the other side of the established proposition that all post-petition interest is cut off on a provable debt which is discharged by section 17 because such a discharge is retroactive to the date of the filing of the petition in bankruptcy and interest cannot run after the principal has been discharged. 3 Collier on *Bankruptcy* (14th ed. 1962), ¶ 63.16, p. 1861.[6]

The correctness of this common understanding that Congress intended to leave the entire amount of certain debts (interest as well as principal) unaffected by bankruptcy proceedings is confirmed by the fact that post-bankruptcy interest on these debts simply cannot be discharged under the language of section 17 of the Act (11 U.S.C. 35). The discharge provision states that a "discharge in bankruptcy shall release a bankrupt from all of his provable debts" except those of six enumerated classes, the first of which is debts "due as a tax levied by the United States, or any State * * *."[7] To be discharged, a

[6] Speaking of post-petition interest on a debt that is discharged, Collier states (p. 1861):

"* * * while it is true that a debt which is not provable is not discharged, interest is only an incident and appurtenance of a debt that is, in the situation here considered, provable. It should not survive the source from which it stems, namely the debt retroactively extinguished as of the filing date."

[7] The next five classes of debts which are not discharged are:

(2) liabilities for: obtaining money or property by false representations, willful and malicious injuries to person or property, alimony, maintenance or support of wife or

creditor's claim must be both (1) a provable debt *and* (2) not specifically excepted from discharge. We shall show first with regard to interest accruing after the final termination of the bankruptcy proceeding and then with regard to interest accruing during the proceeding, that post-petition interest on a tax claim is not a provable debt. We shall then show that, in any event, to the extent that interest is provable it is excepted from discharge by section 17.

A. *Interest accruing after the final termination of the proceeding in bankruptcy is not discharged because it is not a provable debt.*

The Bankruptcy Act does not discharge a creditor's right of action against the debtor unless the creditor receives, in exchange, a provable claim against the bankruptcy estate, *i.e.*, unless the creditor's claim is a provable debt. Liabilities arising after the termination of the bankruptcy proceeding are, of course, not claims that are "provable" against the bankruptcy estate and they are, therefore, not discharged. Interest accruing after the termination of the proceeding on a debt which is preserved against discharge by the Act is such a non-provable, and, therefore, undischarged liability. It is not a "provable debt" within the requirements for discharge in section 17 because:

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child, various specified causes of action involving sex relations.

(3) Unscheduled claims.

(4) Debts created by fraud, embezzlement, misappropriation or defalcation in a fiduciary capacity.

(5) Wages earned within three months before bankruptcy.

(6) Moneys of an employee deposited to secure performance of a contract of employment.

(1) it has not become due at any time during the proceeding; and (2) there is no way of estimating whether it will ever be owing or in what amounts, for the debtor may repay the debt before the interest becomes due. Such debts are never "provable" in determining the distribution of the bankruptcy estate.

Finally, even if such a liability for interest accruing after the termination of the bankruptcy proceeding were otherwise "provable" under section 63, it would be treated as non-provable for purposes of the discharge provision because it cannot be valued during the proceeding. Section 57d provides that even a provable claim

> shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this title.

An interest claim for a wholly indefinite future period is such a claim. In this situation, section 63d provides that even an otherwise provable debt shall retroactively lose its character as "provable" so that the creditor, who cannot obtain payment of his claim out of the assets of the bankrupt estate, shall not be prevented by section 17 from bringing an action on the debt against the debtor personally. See 3 Collier on *Bankruptcy, supra,* ¶¶ 57.15, 63.16; H. Rep. No. 1409, 75th Cong., 1st Sess., pp. 14–15, to accompany the 1938 Revision of the National Bankruptcy Act.

B. *Interest accruing during the pendency of a bankruptcy proceeding is not discharged because it is not a provable debt.*

"The firmly established general rule is that the provability of a claim depends upon its status at the time the petition is filed." 3 Collier on *Bankruptcy* (14th ed. 1962), ¶ 63.04, p. 1772. With certain specifically enumerated exceptions, unless a debt is due at that date it is not provable. Since *Sexton* v. *Dreyfus*, 219 U.S. 339, this rule "has been recognized to govern the computation of interest." *Id.* at 1774. Interest accruing after the filing of the petition in bankruptcy is not an exception provided for by the statute. To the contrary, section 63, which defines provability of claims, indicates clearly that post-petition interest shall not be provable. Thus section 63(a)(1) makes provable against the trustee a debt on a judgment or written instrument but only "with any interest thereon which would have been recoverable" "at the time of the filing of the petition". And section 63(a)(5) includes, as provable, debts "reduced to judgments after the filing of the petition" but only after subtracting "interest accrued after the filing of the petition."

Referring specifically to these considerations, this Court held in *New York* v. *Saper, supra*, that post-petition interest on a tax claim is not authorized against the estate. While the opinion is not explicit as to whether such interest is not provable or is provable but, simply as an equitable matter, not allowable against the estate, we submit that the general rule defining provability of claims as of the date of petition and the explicit exceptions of post-petition

interest from provable claims in section 63 establish that post-petition interest is not provable.[3] See MacLachlan, *Bankruptcy*, Sec. 147, p. 141 ("It is now settled by Supreme Court decision, that interest on taxes after the date of the petition is not provable").

C. *Interest on an undischarged debt, to the extent that it is provable, is an integral part of the debt excepted from discharge.*

Even if some part of the post-petition interest on a tax were provable against the trustee, it would be preserved against discharge by the exception for "provable debts" for taxes. Interest on a provable liability is not, itself, a separately provable debt in bankruptcy.[4] To the extent that such interest is provable it is always as an integral part of the single claim for principal and interest made provable by the Act. When, for example, a debt on a note with interest to date of the petition in bankruptcy is made provable by section 63(a)(1) there are not three separate debts: a provable debt for the principal amount of the note; a provable and allowable debt for interest to the date of petition; and a not-provable or, at least, not allowable, debt for post-petition interest. There is a

[3] The fact that post-petition interest can be collected from a solvent estate (*supra*, p. 10) does not show that such interest is provable. Such interest is allowed merely as an adjustment of the equities of debtor and creditors and is allowed on claims under 63(a) (1) and (5)—where such interest is explicitly made non-provable—as well as on all other debts.

[4] As long ago as the leading case of *Johnson* v. *Norris*, 190 Fed. 459, 465 (C.A. 5), it was established that:

"The proof of an interest-bearing claim is proof of the interest collectible on such claim. Interest is an incident of, or a part of, the debt, and no separate proof of it is required."

single provable debt for principal and interest on a note which must, as a matter of liquidation practice, be valued as of some date, and the date chosen is the date of the petition. See *Sexton* v. *Dreyfus*, 219 U.S. 339, 344-345.

The Act provides other illustrations of the fact that interest, to the extent it is provable, is always treated as an integral part of the debt on which it accrued. Thus, section 63(a)(5) defines and values the provable debt by subtracting post-petition interest from a judgment obtained after the filing of the petition, leaving principal and all other interest as a single provable debt. And the pre-petition interest authorized by the other subsections of section 63 is authorized only implicitly as part of another debt. Again, all provable interest, as well as principal, has regularly been given the priority that section 64 affords only to provable debts for "taxes legally due and owing by the bankrupt to the United States or any State * * *." See, *e.g.*, *In re Lexington Homes*, 94 F. Supp. 482 (D.N.J.). In each of these instances interest, to the extent it is provable, is treated as an integral part of a single debt for principal and interest; it is never handled in any other way by the statute.

To the extent that interest is provable on a tax liability it is provable as part of a single provable debt for taxes. But provable debts for taxes are specifically excepted from discharge by section 17. This is the reason pre-petition interest is concededly not discharged in the present case. The same rationale

would control post-petition interest if it, too, were provable.[10]

In sum, section 17 of the Bankruptcy Act is intended to except *all* of a debt for taxes (including both principal and interest) from discharge. So much of the debt as is not provable is not discharged because only provable debts are discharged; as much as is provable is specifically excepted from discharge.[11] The necessary result conforms precisely to the generally held assumption (*supra*, pp. 12–14) that, when the Act preserves a debt from discharge, it means that the debt is unaffected by the bankruptcy proceeding and retains all its normal incidents including continuing interest.

III

IN EXCEPTING FEDERAL TAXES FROM DISCHARGE, CONGRESS INTENDED TO INCLUDE THE ACCOMPANYING INTEREST, WHICH THE FEDERAL TAX LAWS HAVE, FOR MANY YEARS, DEFINED AS AN INTEGRAL PART OF THE TAX; SECTION 6873(a) OF THE 1954 CODE DOES NOT INDICATE A CONTRARY INTENT FOR CASES WHERE THE UNITED STATES HAS FILED A CLAIM AGAINST THE ESTATE

1. What has been said would apply to interest on *any* debt excepted from discharge by section 17. There are, moreover, additional reasons why interest must be treated as part of a tax debt due the federal

[10] Judge Frank, dissenting in *Sword Line* v. *Industrial Commissioner of New York*, 212 F. 2d 865, 870, regarded post-petition interest on a tax as "provable" but not discharged for this reason.

[11] The same is, of course, true of each of the other classes of debts excepted from discharge by section 17.

government and excepted, therefore, from discharge by section 17.

For the years here in issue, the interest claimed by the government was imposed, so far as the Social Security taxes are concerned, by section 1420(b) of the Internal Revenue Code of 1939 (Appendix A, *infra*, p. 28), which provides:

> (b) Addition to Tax in Case of Delinquency.—If the tax is not paid when due, there shall be added *as part of the tax* interest * * * at the rate of 6 per centum per annum from the date the tax became due until paid. [Emphasis supplied.]

Section 1627 of the 1939 Code (Appendix A, *infra*, p. 29), dealing with the withholding tax, incorporates by reference section 1420(b). Indeed, the general scheme of the Code throughout is to treat interest as part of the tax. For example, section 292(a) of the 1939 Code and its predecessor provisions since 1918, dealing with interest on deficiencies in income tax, have provided that interest shall be collected "as a part of the tax" and a number of other sections contain similar provisions.[12] Related provisions stating that interest shall be collected in the same manner as the tax have been included in our tax laws since long before 1898 when the present Bankruptcy Act was

[12] See *e.g.*, Sections 294(a)(1); 294(b); 295; 296; 297; 298; 890(a) and (b); 891; 892; 893(a)(1); 893(b)(1), (3), and (4); 1020(a) and b); 1021; 1022; 1023(a)(1); 1023(b)(1), (3), and (4); 1530(c); 1605(b); 1717; 1853(c); 2403(b); 2451(b); 2475; 2706; 3448(b); 3470; 3495; and 3779(i). The provisions of the 1954 Code are substantially the same. See Sections 6601(a) and (f) and 6659(a)(2).

first passed. See, *e.g.*, Revised Statutes, Sec. 3176. The policy expressed by each of these provisions is that the time of payment and, accordingly, the right to interest is as essential a part of the scheme of revenue collection as is the tax itself. These provisions are, in short, bottomed on "the basic necessity of the Government to collect a carefully estimated sum of money by a particular date in order to meet its anticipated expenditures." *Rodgers* v. *United States*, 332 U.S. 371, 374.

The courts have also long recognized that interest constitutes an integral part of a tax liability. For example, interest has been considered as part of the tax for purposes of bringing a suit for refund (*Nelson-Wiggin Piano Co.* v. *United States*, 84 F. 2d 47 (C.A. 7); of denying an injunction against "the collection of taxes" (*Voss* v. *Hinds*, 208 F. 2d 912 (C.A. 10); and of asserting liability against a transferee or a partner, where the transferor or the partnership failed to make a timely payment of the taxes owed (*Young* v. *Riddell*, 283 F. 2d 909, 910–911 (C.A. 9)). In short, the courts have recognized a

> general rule that a tax and resulting interest are to be treated as constituting a single liability and thus one cause of action, and not merely an aggregation of separate items of indebtedness.[11]

This historic treatment of interest in a manner identical to that of the underlying Federal tax lia-

[11] *Western Maryland Ry. Co.* v. *United States*, 23 F. Supp. 554, 556 (D. Md.).

bility was doubtless known to Congress in passing and repeatedly amending section 17 of the Bankruptcy Act, which has always excepted from discharge all of a tax liability due the United States. There is accordingly every reason to assume that when Congress determined that the necessities of collecting revenue required preserving taxes against discharge by section 17, it also intended to preserve the interest which has for so long been treated as part of the tax by the Internal Revenue Code.

2. Petitioner contends that, while the government is free to ignore the bankruptcy proceedings and rely on its undischarged claim against the taxpayer for principal and interest, if it files a claim in the bankruptcy proceeding, section 6873 of the Internal Revenue Code of 1954[11] limits the government's rights against the debtor to the recovery of unpaid sums allowed by the trustee. Post-petition interest is not so allowed (Pet. Br. 9–12). Since the debtor benefits in the form of a reduction of his liability by any recovery the government makes from the estate, there is absolutely no reason why some part of the government's rights against the debtor should be "waived" by filing a claim in the bankruptcy proceeding. It is clear, moreover, that section 6873(a) of the Internal Revenue Code of 1954 was never intended to limit the

[11] Section 6873 provides:

"(a) General Rule.—Any portion of a claim for taxes allowed in a receivership proceeding or any proceeding under the Bankruptcy Act which is unpaid shall be paid by the taxpayer upon notice and demand from the Secretary or his delegate after the termination of such proceeding."

government's right to continuing interest on an undischarged tax liability.

This section, together with the predecessor provisions of section 6871, was first passed, in nearly identical language, as Section 282 of the Revenue Act of 1926 (44 Stat. 62). Its purpose was to allow the government's claim for a deficiency to be contested before the bankruptcy court without awaiting the initiation and resolution of proceedings before the Board of Tax Appeals (now the Tax Court). Otherwise, it was thought, the government might be prevented from collecting the deficiency out of the bankruptcy estate. Congress feared that the statute might imply that the government was surrendering its rights against the debtor as to claims which were allowed against the estate but not paid. Out of an excess of caution, the provision now found in section 6873(a) was added to make clear that: "The bankruptcy and receivership proceedings do not foreclose any unsatisfied portion of the claim of the United States and such portion may be collected by distraint or otherwise within six years after the termination of the bankruptcy or receivership proceedings." S. Rep. No. 52, 69th Cong., 1st Sess., p. 31; H. Rep. No. 356, 69th Cong., 1st Sess., pp. 45–46.[15]

[15] It is worth noting that, in passing the 1926 Act, Congress plainly assumed that post-petition interest was allowable for the period during the pendency of the bankruptcy proceeding. It, therefore, could be collected from the debtor if it was not paid by the trustee. See H. Rep. No. 356, 69th Cong., 1st Sess., pp. 45–46. Moreover, the statute itself imposed interest after the termination of the bankruptcy proceeding on the unpaid amount allowed by the trustee. See section 282(c) of the Revenue Act of 1926, 44 Stat. 62.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals is correct and should be affirmed.

Respectfully submitted,

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APPENDIX A

Bankruptcy Act, c. 541, 30 Stat. 544, *et seq.*:

Sec. 17 [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840]. *Debts Not Affected by a Discharge.*—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if know to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; or (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment.

(11 U.S.C. 1958 ed., Sec. 35.)

Sec. 57 [as amended by Act of June 22, 1938, *supra*]. *Proof and Allowance of Claims.*

* * * * *

(d) Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however,* That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act.

* * * * *

(26 U.S.C. 1958 ed. Sec. 93.)

SEC. 63 [As amended by Act of June 22, 1938, *supra*]. *Debts Which May Be Proved.*—a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) costs taxable against a bankrupt who was at the time of the filing of the petition by or against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a probable debt; (4) an open account, or a contract express or implied; (5) provable debts reduced to judg-

ments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments; (6) an award of an industrial-accident commission, body, or officer of any State having jurisdiction to make awards of workmen's compensation in case of injury or death from injury, if such injury occurred prior to adjudication; (7) the right to recover damages in any action for negligence instituted prior to and pending at the time of the filing of the petition in bankruptcy; (8) contingent debts and contingent contractual liabilities; or (9) claims for anticipatory breach of contracts, executory in whole or in part, including unexpired leases of real or personal property * * *

* * * * * *

d. Where any contingent or unliquidated claim has been proved, but, as provided in subdivision d of section 57 of this Act, has not been allowed, such claim shall not be deemed provable under this Act.

(11 U.S.C. 1958 ed., Sec. 103.)

SEC. 64 [As amended by Act of June 22, 1938, *supra*; Sec. 131, Act of May 24, 1949, c. 139, 63 Stat. 89; and Sec. 19(a), Act of July 7, 1952, c. 579, 66 Stat. 420]. *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * *

* * * * * *

* * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof * * *

* * * * * *

(11 U.S.C. 1958 ed., Sec. 104.)

Internal Revenue Code of 1939:

SEC. 1420. COLLECTION AND PAYMENT OF TAXES.

* * * * * *

(b) *Addition to Tax in Case of Delinquency.*—If the tax is not paid when due, there shall be added as part of the tax interest (except in the case of adjustments made in accordance with the provisions of section 1401 (c) and 1411) at the rate of 6 per centum per annum from the date the tax became due until paid.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 1420.)

SEC. 1627. [As added by Sec. 2(a), Current Tax Payment Act of 1943, 57 Stat. 126]. OTHER LAWS APPLICABLE.

All provisions of law, including penalties, applicable with respect to the tax imposed by section 1400 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax under this subchapter.

(26 U.S.C. 1952 ed., Sec. 1627.)

Internal Revenue Code of 1954:

SEC. 6873. UNPAID CLAIMS.

(a) General Rule.—Any portion of a claim for taxes allowed in a receivership proceeding or any proceeding under the Bankruptcy Act which is unpaid shall be paid by the taxpayer upon notice and demand from the Secretary or his delegate after the termination of such proceeding.

* * * * * *

(26 U.S.C. 1958 ed., Sec. 6873.)

Appendix B

Decisions allowing post-bankruptcy interest on debts, other than taxes, excepted from discharge under Section 17a of the Bankruptcy Act.*

Section 17a(2), False Pretenses and False Representations:

California Bank v. *Clay*, 207 Cal. App. 2d 25, 24 Cal. Rptr. 185 (1962)

Personal Finance Co. v. *Beeman*, 9 Conn. Supp. 103 (C.P., 1941)

Personal Finance Co. of New Haven v. *Vigneault*, 10 Conn. Supp. 446 (C.P., 1942)

M–A–C Loan Plan, Inc. v. *Cooper*, 23 Conn. Supp. 184, 179 A. 2d 313 (Cir. Ct., 1961)

Loony Creek Coal Co. v. *Lewis*, 227 Ky. 323, 12 S.W. 2d 852 (1928)

C H F Finance Co. v. *Jochum*, 241 La. 155, 127 S. 2d 534 (1961)

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*The sole non-tax decision in which interest was disallowed was that of the trial court in *Accounts Supervision Co.* v. *Atley*, 89 S. 2d 508 (La. App., 1956) (The trial court awarded judgment to the creditor for the principal amount of the debt but denied post-petition interest. The appellate court reversed the judgment with respect to the principal amount of the debt and stated that it was unnecessary to decide the interest issue.)

Without discussion post-bankruptcy interest was allowed under section 17a in the following tax cases: *United States* v. *Piper*, 202 F. Supp. 657 (E.D. Ill., 1961); *Gilbert* v. *United States Fidelity & Guaranty Co.*, 180 F. Supp. 794 (M.D. Ga., 1959), affirmed *per curiam*, 274 F. 2d 823 (C.A. 5th, 1960); *City of Philadelphia* v. *Spotless, Inc.*, 19 Pa. D.&C. 2d 148 (1958). The only contrary decision, aside from those discussed *supra*, p. 11, n. 2, is *St. Paul-Mercury Indemnity Co.* v. *Donaldson*, 225 S.C. 476, 83 S.E. 2d 159 (1954).

Armour Fertilizer Works v. *Peninger*, 158 So. 241 (La. App., 1935)

Personal Finance Co. of Shreveport v. *Murphy*, 53 S. 2d 421 (La. App., 1951)

Morris Finance & Loan v. *Dickerson*, 57 S. 2d 786 (La. App., 1952)

Public Loan Corp. v. *Adams*, 66 S. 2d 6 (La. App., 1953)

Equitable Securities Co. v. *Schwaner*, 107 S. 2d 330 (La. App., 1958) (The trial court awarded judgment for the principal amount of the debt plus post-petition interest. The appellate court reversed with respect to the principal amount of the debt.)

Earl Staehle Finance, Inc. v. *Brooks*, 144 S. 2d 155 (La. App., 1962)

Excel Finance Baronne, Inc. v. *Dobbs*, 146 S. 2d 202 (La. App., 1962) (The trial court awarded judgment for the principal amount of the debt plus post-petition interest. The appellate court reversed with respect to the principal amount of the debt.)

Liberal Finance Gentilly, Inc. v. *Brister*, 152 S. 2d 331 (La. App., 1963)

C H F Finance Co. v. *Corca*, 152 S. 2d 830 (La. App., 1963)

Liberal Finance Corp. v. *Holley*, 157 S. 2d 376 (La. App., 1963)

Personal Finance Co. v. *Moore*, 153 Maine 122, 135 A. 2d 414 (1957)

Levin v. *Singer*, 227 Md. 47, 175 A. 2d 423 (1961)

International Trust Co. v. *Myers*, 241 Mass. 509, 135 N.E. 697 (1922), reversed on other grounds, 263 U.S. 64 (1923)

Maier v. *Meyers*, 314 Mich. 471, 22 N.W. 2d 869 (1946)

Dick v. *Dick*, 11 N.J. Super., 533, 78 A. 2d 580 (1951)

Beneficial Finance Co. v. *Norton*, 76 N.J. Super. 577, 185 A. 2d 218 (1962)

Growers Exchange v. *Hartman*, 220 N.C. 30, 16 S.E. 2d 398 (1941)

Public Loan Corp. v. *Hood*, 71 Ohio L. Abs. 423, 125 N.E. 2d 770 (C.P., 1955)

Topolos v. *Skotheim*, 126 Ore. 683, 270 Pac. 753 (1928)

Porta v. *Weathers*, 5 Tenn. App. 555 (1927)

Gaddy v. *Witt*, 142 S.W. 926 (Tex. Civ. App., 1911)

Boerner v. *Cicero Smith Lumber Co.*, 293 S.W. 632 (Tex. Civ. App., 1927), reversed on other grounds, 298 S.W. 545 (Tex. Comm. App., 1927)

Ginsberg v. *International Shoe Co.*, 299 S.W. 695 (Tex. Civ. App., 1927)

Blumberg v. *Louis Henne Co.*, 5 S.W. 2d 1015 (Tex. Civ. App., 1928)

Public Finance Corp. v. *Londeree*, 200 Va. 607, 106 S.E. 2d 760 (1959) (The trial court awarded judgment for the principal amount of the debt plus post-petition interest. The appellate court reversed with respect to the principal amount of the debt.)

Household Finance Corp. v. *DeShazo*, 57 Wash. 2d 771, 359 P. 2d 1044 (1961)

Household Finance Corp. v. *Christian*, 8 Wis. 2d 53, 98 N.W. 2d 390 (1959)

Section 17a(2), Willful and Malicious Injuries:

Barbachano v. *Allen*, 192 F. 2d 836 (C.A. 9th, 1951)

Western Surety Co. v. *Rich*, 141 F. Supp. 872 (W.D. Okla., 1956)

Fitzgerald v. *Herzer*, 78 Cal. App. 2d 127, 177 P. 2d 364 (1947)

Russell v. *Peters*, 219 Iowa 708, 259 N.W. 197 (1935)

Excel Finance Camp, Inc. v. *Tannerhill*, 140 S. 2d 202 (La. App., 1962)

Tudryck v. *Mutch*, 320 Mich. 86, 30 N.W. 2d 512 (1948), certiorari denied *sub nom. Tudryck* v. *Martin*, 334 U.S. 819 (1948)

Wood v. *Fiske*, 175 App. Div. 135, 161 N.Y.S. 1097 (1916)

Ever-Ready Label Corp. v. *Stuyvesant Photo Engraving Corp.*, 36 N.Y. S. 2d 468 (Sup. Ct., 1942)

Magidson v. *Smith*, 113 Ohio App. 465, 178 N.E. 2d 813 (1961)

Sabinal Nat. Bank v. *Bryant*, 221 S.W. 940 (Tex. Comm. App., 1920)

Smith v. *Ladrie*, 98 Vt. 429, 129 Atl. 302 (1925)

Estate of Weil, 249 Wis. 385, 24 N.W. 2d 662 (1946), certiorari denied *sub. nom. Weil* v. *Haessler Hardware Co.*, 331 U.S. 807 (1947)

Section 17a(2), Alimony and Support:

In re Avery, 114 F. 2d 768 (C.A. 6th, 1940)

Blair v. *Blair*, 44 Cal. App. 2d 140, 112 P. 2d 39 (1941)

Allison v. *Allison*, 372 P. 2d 946 (Colo., 1962)

Cederberg v. *Gunstrom*, 193 Minn. 421, 258 N.W. 574 (1935)

Ross v. *Keith*, 238 App. Div. 640, 265 N.Y.S. 246 (1933)

Webster v. *Webster*, 24 Pa. Dist. 884 (1913)

Egbers v. *Egbers*, 98 Wash. 581, 167 Pac. 1073 (1917)

Section 17a(3), Nonscheduled Debts:

United States v. *Kassan*, 208 F. Supp. 858 (S.D. Cal., 1962)

King v. *Harry*, 131 F. Supp. 252 (D.C. D.C., 1955)

Ashbaugh v. *Belanger*, 39 F. Supp. 401 (E.D. Mich., 1941)

United States v. *Golenburg*, 175 F. Supp. 415 (N.D. Ohio, 1959)

United States v. *Hermetic Seal Products Co.*, 198 F. Supp. 749 (P.R., 1961), modified, 307 F. 2d 809 (C.A. 1st, 1962), affirmed, 309 F. 2d 482 (C.A. 1st, 1962), certiorari denied, 371 U.S. 954 (1963)

Gilmore v. *Farmer*, 156 Ill. App. 70 (1910)

Welch v. *Noah*, 52 S.W. 2d 493 (Mo. App., 1932)

Wohlschlaeger v. *Dorsey*, 206 S.W. 2d 677 (Mo. App., 1947)

Wheeler v. *Newton*, 168 App. Div. 782, 154 N.Y. S. 431 (1915), affirmed, 220 N.Y. 607, 115 N.E. 1053 (1917)

Horbach v. *Arkell*, 172 App. Div. 566, 158 N.Y.S. 842 (1916)

Collins v. *McWalters*, 35 Misc. 648, 72 N.Y.S. 203 (Sup. Ct., 1901)

Columbia Bank v. *Birkett*, 36 Misc. 391, 73 N.Y. S. 704 (Sup. Ct., 1901), affirmed, 65 App. Div. 615, 73 N.Y.S. 1132 (1901), affirmed, 174 N.Y. 112, 66 N.E. 652 (1903), affirmed, 195 U.S. 345 (1904)

Bronx Credit Union v. *Weisbrott*, 203 N.Y.S. 90 (App. T., 1924)

Morganstern v. *Tulchin*, 140 Misc. 44, 250 N.Y.S. 498 (Mun. Ct., 1931)

Johnson v. *Fountain*, 200 N.C. 388, 157 S.E. 21 (1931) (The trial court awarded judgment for the principal amount of the debt plus post-petition interest. The appellate court reversed with respect to the principal amount of the debt.)

Lown v. *Casselman*, 25 N.D. 44, 141 N.W. 73 (1913)

Cole v. *Beals*, 66 Ohio App. 173, 32 N.E. 2d 48 (1940)

Fifth Ave. B. & L. Assn. v. *Goldberg*, 22 Pa. Super. 197 (1903)

Ingram v. *Carruthers*, 194 Tenn. 290, 250 S.W. 2d 537 (1952)

Dodgen v. *McCrea*, 225 S.W. 71 (Tex. Civ. App., 1920)

Taylor v. *Thompson*, 39 S.W. 2d 923 (Tex. Civ. App., 1931) reversed on other grounds *sub nom. Byrne* v. *Taylor*, 58 S.W. 2d 22 (Tex. Comm. App., 1933)

Section 17a(4), Fiduciary Misconduct:

Hartford Accident & Indemnity Co. v. *Flanagan*, 28 F. Supp. 415 (S.D. Ohio, 1939)

Raia v. *Goldberg*, 34 S. 2d 620 (Ala. App., 1948)

Morris v. *Covey*, 104 Ark. 226, 148 S.W. 257 (1912)

England Loan Co. v. *Campbell*, 183 Ark. 49, 35 S.W. 2d 75 (1931)

Donahue v. *Conley*, 85 Cal. App. 15, 258 Pac. 985 (1927)

Des Moines Bk. & Tr. Co. v. *Bechtel & Co.*, 243 Iowa 1007, 51 N.W. 2d 174 (1952)

Boyd v. *Applewhite*, 121 Miss. 879, 84 So. 16 (1920)

Parish v. *Lumbermen's Mutual Co.*, 242 Miss. 288, 134 S. 2d 488 (1961)

Ruff v. *Milner*, 92 Mo. App. 620 (1902)

Frey v. *Torrey*, 36 Misc. 216, 73 N.Y.S. 201 (App. T., 1901), affirmed, 70 App. Div. 166, 75 N.Y.S. 40 (1902), affirmed, 175 N.Y. 501, 67 N.E. 1082 (1903)

Jewish Kosher Provision Corp. v. *Gottfried*, 63 N.Y.S. 2d 160 (City Ct., 1946)

Bannon v. *Knauss*, 57 Ohio App. 288, 13 N.E. 2d 733 (1937)

Fidelity & Casualty Co. of New York v. *Brown*, 40 Ohio L. Abs. 617, 14 Ohio Supp. 95 (C.P., 1943)

McClain v. *Madry*, 6 Tenn. App. 75 (1927)

Brown v. *Robey*, 27 S.W. 2d 590 (Tex. Civ. App., 1930)

Orndorff v. *State*, 108 S.W. 2d 206 (Tex. Civ. App., 1937)

Stickney v. *Parmenter*, 74 Vt. 58, 52 Atl. 73 (1901)

Estate of Weil, 249 Wis. 385, 24 N.W. 2d 662 (1946) certiorari denied *sub nom. Weil* v. *Haessler Hardware Co.*, 331 U.S. 807 (1947)

U.S. GOVERNMENT PRINTING OFFICE:1950

SUPPLEMENTAL APPENDIX

I

A. Revenue Act of 1926 (Title II—Income Taxes):

SEC. 276.

* * * * * *

(c) For any period an estate is held by a fiduciary appointed by order of any court of competent jurisdiction or by will, there shall be collected interest at the rate of 6 per centum per annum in lieu of the interest provided in subdivisions (a) and (b) of this section.

(44 Stat. 58.)

* * * * * *

SEC. 282. (a) Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this title upon such taxpayer shall, despite the provisions of subdivision (a) of section 274, be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. Claim for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which

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the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

(b) Any portion of the claim allowed in such bankruptcy or receivership proceeding which is unpaid shall be paid by the taxpayer upon notice and demand from the collector after the termination of such proceeding, and may be collected by distraint or proceeding in court within six years after termination of such proceeding.

(c) If the amount of such portion of the claim is not paid in full within 10 days from the date of notice and demand from the collector, then there shall be collected as a part of such amount interest upon the unpaid portion thereof at the rate of 1 per centum a month from the date of such notice and demand until payment. * * *

(44 Stat. 62.)

B. H. Rep. No. 356, 69th Cong., 1st Sess., pp. 45–46:

* * * * *

The bankruptcy and receivership proceedings do not foreclose any unsatisfied portion of the claim of the United States and such portion may be collected by distraint or otherwise within six years after the termination of the bankruptcy or receivership proceedings. * * *

* * * * *

Interest for any period during which the estate of the taxpayer is under the control of the trustee

or receiver appointed by the equity or bankruptcy court is provided at the rate of 6 per cent a year in lieu of 1 per cent a month in certain cases by sections 276(c) and 279(j).

II

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

CHAPTER 1.—INCOME TAX

* * * * *

SEC. 298. BANKRUPTCY AND RECEIVERSHIPS.

If the unpaid portion of the claim allowed in a bankruptcy proceeding, as provided in section 274, is not paid in full within ten days from the date of notice and demand from the collector, then there shall be collected as a part of such amount interest upon the unpaid portion thereof at the rate of 6 per centum per annum from the date of such notice and demand until payment.

III

Internal Revenue Code of 1954, 26 U.S.C. (1958 ed.):

SEC. 6601. INTEREST ON UNDERPAYMENT, NONPAYMENT, OR EXTENSIONS OF TIME FOR PAYMENT, OF TAX.

(a) *General Rule.*—If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the rate of 6 percent per annum shall be paid for the period from such last date to the date paid.

* * * * *

(f) *Applicable rules.*—Except as otherwise provided in this title—

"(1) *Interest treated as tax.*—Interest prescribed under this section on any tax shall be paid upon notice and demand, and shall be assessed, collected, and paid in the same manner as taxes. Any reference in this title (except subchapter B of chapter 63, relating to deficiency procedures) to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax."

* * * * * *

"(2) *No interest on interest.*—No interest under this section shall be imposed on the interest provided by this section."

* * * * * *